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In The

Supreme Court of the United States

October Term, 1996

LAURENCE S. FORDHAM,

Petitioner,

vs.

MASSACHUSETTS BAR COUNSEL,

Respondent.

Petition for Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts

PETITION FOR WRIT OF CERTIORARI

HENRY P. MONAGHAN
435 West 116 Street
New York, New York 10027
(212) 854-2644
Of Counsel

JOHN LEUBSDORF
15 Washington Street
Newark, New Jersey 07102
(201) 648-5273
Counsel of Record

DANIEL COQUILLETTE
885 Centre Street
Newton, Massachusetts 02159
(617) 552-8650
Of Counsel

LAURENCE M. JOHNSON
MAHONEY, HAWKES & GOLDINGS
75 Park Plaza
Boston, Massachusetts 02116
(617) 457-3100
Counsel for Petitioner

70121 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, Inc.

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QUESTION PRESENTED

Whether a lawyer is denied Due Process when disciplined for charging a "clearly excessive" fee although no authority anywhere forbad charging at an hourly rate for hours devoted conscientiously, diligently and in good faith to a criminal defendant who agreed after full disclosure to an hourly rate fee, insisted on a full defense for which he said he could pay, approved all the lawyer's activities, and accepted his monthly bills without dispute?

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IN THE
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LAURENCE S. FORDHAM,
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MASSACHUSETTS BAR COUNSEL,
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On Petition for Writ of Certiorari to the
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For the Commonwealth of Massachusetts

PETITION FOR WRIT OF CERTIORARI

Petitioner Laurence S. Fordham prays that certiorari issue to review the judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts entered August 9, 1996.

OPINIONS BELOW

The Supreme Judicial Court's opinion appears at 668 N.E.2d 816 and in the appendix hereto (1a-25a). The Board of Bar Overseers' opinion appears at 11 Mass. Attorney

Discipline Reports 501, and at 64a-77a. The unreported opinions of the Hearing Committee and of the Chairman of the Board of Bar Overseers appear at 39a-62a, 27a-38a respectively.

JURISDICTION

The Supreme Judicial Court entered its judgment disciplining Petitioner on August 9, 1996 (26a) and denied rehearing on September 11, 1996 (78a). This Court has jurisdiction to review that judgment under 28 U.S.C. § 1257(a).

PROVISION INVOLVED

S.J.C. Rule 3:07, DR 2-106

"(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

(B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence, experienced in the area of the law involved, would be left with a definite and firm conviction that the fee is substantially in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent."

STATEMENT OF THE CASE

The Massachusetts Court disciplined Petitioner for charging a "clearly excessive" fee. The Chairman of the Board of Bar Overseers (27a-38a), the Hearing Committee--which made extensive findings of fact--(39a-62a), and the Board of Bar Overseers (64a-77a) all had found discipline unwarranted. The Court rejected (22a-25a) Petitioner's claim that discipline would deny him due process because, when he charged the fee, he lacked notice that his conduct was subject to discipline.

In 1989, Laurence Clark (Clark) met with Petitioner to obtain help for his son Timothy.[1] Timothy had been arrested on charges of driving under the influence, operating a motor vehicle while his license was suspended for multiple speeding violations, speeding, and operating an unregistered vehicle. He was driving at 55 miles per hour in an area zoned for 35 miles per hour, and had cut through a parking lot (R. 75). Timothy failed all field sobriety tests, including the alphabet test and the

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[1] This petition will refer interchangeably to "the Clarks," "Clark," and "the client."

test of walking heel and toe. His speech was slurred, he was flushed, he had alcohol on his breath, and he was unsteady on his feet. His breathalyzer tests yielded readings of .10 and .12 (both above the presumptive level of intoxication under Mass. G.L. c. 90, § 24(e) as it then read). In his car, the police found an open quart bottle of vodka which was one-half to two-thirds empty (40a; R. 75-77, Ex. 2; R. 1245, 1306).

Petitioner had then been in practice thirty-two years. He was a former U.S. Supreme Court law clerk, a former managing partner of a prominent Boston law firm, and a cofounder of another firm. He taught professional responsibility at Harvard Law School for two years, and had no disciplinary record (29a). He was "a very experienced senior trial attorney with impressive credentials" (55a).[2] He had not, however, represented a client in a criminal case or tried a case in the state District Courts (41a-42a).

Before meeting with Petitioner, the Clarks consulted three other attorneys, who quoted fees between $3,000 and $10,000. Clark understood these to be flat fees, with possible additional costs for expenses, but may have confused flat fees with retainers (41a). These attorneys advised Timothy to plead guilty and accept an alcohol rehabilitation program, which he

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[2] Professor Andrew Kaufman of Harvard Law School submitted a sworn statement describing Petitioner's ability and concern for professional responsibility, his service on the Committee on Professional Ethics of the Massachusetts Bar Association, and his contributions to Prof. Kaufman's own work on professional responsibility. Petitioner was and is a member of the American Law Institute's Members Consultative Group for the pending Restatement of the Law Governing Lawyers.

did not want to do. Clark felt that they were not concerned for his son's welfare. He told Petitioner that he was concerned about his son's future and wanted to support him fully in the defense of the case (54a).

The Clarks and Petitioner discussed the case for about two hours. Petitioner informed the Clarks that he billed on a time charge basis, billed monthly, and gave a 10% discount for prompt payment. Petitioner explained his lack of criminal and state District Court experience to the Clarks. Clark assured Petitioner that he was able to pay for Petitioner's services. Although nothing was decided at this meeting, Clark phoned Petitioner later and asked him to represent Timothy (41a-43a; R. 200, 204-05, 222-23, 378-79, 466-69).

The Court disciplined Petitioner "because the amount of time [Petitioner] . . . spent to educate himself and represent Timothy was clearly excessive despite his good faith and diligence." (21a). During the seven months the case was pending, Petitioner devoted 153 hours to the case, and his associates (whose time was charged at lower rates) devoted 74 hours (47a). Petitioner submitted monthly and revised bills, ultimately totalling $50,022.25 (45a-47a).[3]

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[3] This included an apparent $2,000 premium over time charges, which the Board of Bar Overseers concluded was not an appropriate ground for discipline (71a-74a), and which the Supreme Judicial Court's decision does not rely on. The finding of a premium was based on a misunderstanding of the fee calculation, which occurred because Petitioner was not notified before he was on the stand that this aspect of his billing was in dispute (71a-74a). The discrepancy resulted from time devoted by Petitioner's partner but entered late in the firm's billing system, and from the removal--with the client's

It was stipulated "that all work billed by [Petitioner] . . was actually done and that [Petitioner] . . . and his associates spent the time they claim to have spent." It was also stipulated that Petitioner "acted conscientiously, diligently, and in good faith in representing Timothy and in his billing in this case." (7a). There was no claim that Petitioner's hourly rate ($275) was excessive.

Petitioner "was encouraged to press all reasonable avenues of defense and to pursue the case to trial." (56a). He pressed four pretrial motions, involving extensive briefing. One resulted in suppressing the breathalyzer tests because the readings (.10 and .12) were not "within" .02 of each other, as required by state regulations. Petitioner's argument was "impressive" and "a creative, if not novel, approach to suppression of breathalyzer results." (5a, 12a, 13a). Another motion resulted in dismissal of the charge of operating a motor vehicle after suspension of license, because the defendant had not received notice of suspension. Petitioner withdrew a third motion on the day it was to be heard when his client refused to repeat on the stand what he had previously said to Petitioner and in an affidavit. A fourth motion, based on the lack of a show cause hearing, was denied (43a-44a; R. 87-88, 107-11).

Petitioner conducted a two day trial at which he "obtained a not guilty verdict on a serious charge [operating under the influence] where the facts were heavily stacked against the defense." (44a-45a, 55a). Clark paid a fine of $50 (with no further suspension) for speeding, and $50 costs for operating an unregistered vehicle (R. 1293).

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consent--of the 10% discount for prompt payment. See Brief on Appeal of Respondent, pp. 5-7.

The Hearing Committee found that Clark acquiesced in Petitioner's billing practices. He raised only "mild expressions of concern" on one occasion, and continued to accept Petitioner's services without comment. After Petitioner's bills had exceeded $17,000, Clark paid $10,000; he then stopped paying.[4] The Clarks had informed Petitioner that Timothy did not want to plead guilty, and instructed him to pursue the case to trial (45a-47a, 55a).

Petitioner, although unpaid, "zealously pursued every avenue of defense available to Timothy in order to obtain a dismissal of the charges." Petitioner "was not placed on notice that Clark objected in any real sense to his fees or his billing practices." (53a-55a). The Supreme Judicial Court did not set aside these findings but found them irrelevant because "'[t]he test as stated in the DR 2-106 (A) is whether the fee 'charged' is clearly excessive, not whether the fee is accepted as valid or acquiesced in by the client.'" (22a).

The Court's decision relied on: (a) the testimony of two experts that Petitioner's hours were excessive; and (b) evidence of fees charged by other lawyers for operating under the influence cases that ranged from $1,000 to $10,000, with fees of $12,000 and $35,000 referred to by one of Petitioner's witnesses (12a-15a). Petitioner had submitted testimony by ten leading trial lawyers that his hours and fee were not excessive,[5]

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[4] It later appeared that Clark had a record of not paying bills (Exs. 27-31; R. 1052-58). In effect, he obtained Petitioner's services under false pretences, as he later admitted to Petitioner (R. 222-23).

[5] Samuel Adams (former Superior Court judge), Carol S. Ball (subsequently Superior Court Judge), Edward Barshak (Chairman, Mass. Board of Bar Examiners; former Boston Bar

and the Hearing Committee that heard the case reached the same conclusion (61a).

The Court explicitly declined to require dishonesty, bad faith or overreaching before a lawyer may be disciplined for overcharging (21a). The Court referred to only the first and third of the eight factors listed in S.J.C. Rule 3:07, DR 2-106. There was no finding that any particular activity engaged in by Petitioner was unnecessary. The Court stated that Petitioner's "inexperience in criminal defense work and OUI cases in particular cannot justify the extraordinarily high fee" (17a), but there were no findings as to how many of Petitioner's hours were attributable to this inexperience. The Court did not consider "the results obtained", the "experience, reputation, and ability of the lawyer" or the "difficulty of the questions involved" as required by DR 2-106.

REASONS FOR GRANTING THE WRIT

I. Important Public Concerns Warrant Granting Certiorari.

1. The Massachusetts Court's decision creates huge uncertainty for every lawyer in the country who charges at

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Association President), Jerry Cohen (fee arbitrator), John J. Curtin, Jr. (former President, American Bar Association), Nancy Gertner (subsequently U.S. District Judge), Harold Hestnes (senior partner of a large firm), Robert W. Meserve (former President, American Bar Association), Robert J. Muldoon, Jr. (former Secretary, Mass. Board of Bar Examiners; former President, National Association of Bar Examiners), James D. St. Clair (former counsel to the President). Former Dean Richard Huber of Boston College Law School, also submitted a supporting statement.

hourly rates. Without forewarning, it disciplines a respected lawyer for billing for time spent "conscientiously, diligently and in good faith" (7a), pursuant to a fee contract so providing, when the lawyer "was encouraged to press all reasonable avenues of defense and to pursue the case to trial" (56a) and secured strikingly good results in a difficult case.

2. The decision below rejects the Constitutionally established principle that a lawyer may be disciplined for violating a generally phrased requirement--here one proscribing "clearly excessive" fees--only on the basis of precedent or for "conduct which all responsible attorneys would recognize as improper". *In re Ruffalo*, 390 U.S. 544, 555 (1968) (White, J., concurring); *Gentile v. State Bar*, 501 U.S. 1030 (1991).

3. The decision below is anticompetitive. It tends to exclude hourly fee trial lawyers from areas that have been the preserve of flat fee lawyers practicing the subspecialty of driving-under-the-influence law, to restrain competition between lawyers offering differing kinds of services and levels of thoroughness, and to limit the freedom of clients to obtain counsel of their choice. This Court has prevented such practices, whether imposed directly by professionals[6] or through state courts.[7] The Massachusetts Court has the power

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[6] *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (minimum fee); *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332 (1982) (maximum fee); *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990) (boycott to raise fees); *National Soc'y of Professional Engineers v. United States*, 435 U.S. 679 (1978) (ban on fee bidding).

[7] E.g., *Bates v. State Bar*, 433 U.S. 350 (1977) (advertising ban); *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967) (group legal services).

to promulgate prospectively rules that could limit access to legal services, but it should be required to confront directly and prospectively whether it wishes to do so.

4. To discipline Petitioner for devoting--in good faith and with the client's approval--too many hours to defending a criminal case raises disturbing implications for a defendant's right to quality representation. It would be preferable to require the Massachusetts Court to consider squarely and prospectively whether it wishes to make new law of this sort.

5. The continuing expansion of lawyer discipline makes it appropriate for this Court to consider what notice is Constitutionally required as a predicate for discipline. In the most recent year for which nationwide statistics are available, 5721 practitioners were disciplined, and bar disciplinary systems had jurisdiction over almost a million lawyers.[8]

II. Petitioner Received No Constitutionally Adequate Notice That He Could Be Disciplined For Charging A Client A Mutually Agreed To And Concededly Reasonable Hourly Rate For Services Mutually Agreed To And Provided In Good Faith.

Lawyer discipline, like other punishments, may only be imposed on one who had notice before acting that his conduct was punishable. E.g., *Gentile v. State Bar*, 501 U.S. 1030 (1991); *Kolender v. Lawson*, 461 U.S. 352 (1983); see *In re Ruffalo*, 390 U.S. 544, 554-56 (1968) (White, J., concurring). Petitioner does not challenge the facial validity of the multi-factor standard for excessive fees set forth in Mass. S.J.C. Rule 3:07, DR 2-106. But as applied to the circumstances of this

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[8] A.B.A., Center for Professional Responsibility, Survey of Lawyer Discipline Systems, 1991-92.

case, that provision and the cases construing it fell far short of giving Petitioner any--much less Constitutionally adequate--notice.

A. *Without Notice, The Court Disregarded The Established Standard That Allows Discipline For Excessive Fees Only In Cases Of Dishonesty, Bad Faith Or Egregious Overreaching.*

Until this case, no less than dishonesty, bad faith or egregious overreaching has been required to discipline a lawyer for excessive fees.[9] That is because discipline under a general provision is appropriate only for one of "the criminal offenses traditionally known as malum in se" or for "conduct which all responsible attorneys would recognize as improper for a member of the profession." *In re Ruffalo*, 390 U.S. 544, 555 (1968) (White, J., concurring). "[T]he single standard of an excessive fee is necessarily vague because of the greatly varied settings in which fees are charged, and thus uncertain in its application." Wolfram, *Modern Legal Ethics* 516 (1986). "What is needed is that those charged with interpretation and

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[9] E.g., *McKenzie Constr., Inc. v. Maynard*, 758 F.2d 97 (3d Cir. 1985); *Bushman v. State Bar*, 522 P.2d 312 (Cal. 1974); *In re Kutner*, 399 N.E.2d 963 (Ill. 1979); *In re Greer*, 380 P.2d 482 (Wash. 1963); *Committee on Legal Ethics v. Coleman*, 377 S.E.2d 485 (W. Va. 1988); ABA Ethics Op. 320 (1968), quoted in ABA Model Code of Professional Responsibility, DR 2-106, n. 137("so excessive as to constitute a misappropriation of the client's funds"); Drinker, *Legal Ethics* 174 (1953); *Annotated Code of Professional Responsibility* 101 (O. Maru ed. 1979)("excessive fee" not enough without "overreaching, appropriation of the client's funds under the guise of charging a fee, and so forth").

enforcement build up the common law relating to these rules both as a guide to the profesion and as a necessary predicate for enforcement." Kaufman, *Problems in Professional Responsibility* 668-69 (3d ed. 1989); see Selinger, *Inventing Billable Hours: Contract v. Fairness in Charging Attorney's Fees*, 22 Hofstra L. Rev. 671 (1994) (absent specific prohibitions, lawyers should be required only to fulfill contracts and avoid unconscionable fees).

Massachusetts consistently followed that approach until this case, as shown by the decisions imposing discipline for excessive fees.[10] In this case, none of these prior decisions is in point, and the Court did not cite any of them, except in one instance for a different point. Rather, it made new law, which it applied retroactively to Petitioner.

Massachusetts' DR 2-106 clearly embodies the traditional approach, allowing discipline only for a "clearly excessive" fee that would leave an informed lawyer "with a definite and firm conviction that the fee is substantially in

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[10] *Matter of Clooney*, 531 N.E.2d 1271 (Mass. 1988) (lawyer used power of attorney from hospitalized executor to pay himself excessive fees from estate); *Matter of Kerlinsky*, 546 N.E.2d 150 (Mass. 1989), *cert. denied*, 498 U.S. 1027 (1991) (violation of fee agreement, refusal to turn over funds due client, and other circumstances); *Matter of Saab*, 547 N.E.2d 919 (Mass. 1989) (lawyer obtained fee for prosecuting appeal already dismissed, did not perform work, charged contingent fee without agreement); *Matter of Palmer*, 594 N.E.2d 861 (Mass. 1992) (excessive fee collected by means of misrepresentation to court and client; apparent double billing); *Matter of Tobin*, 628 N.E.2d 1268 (Mass. 1994) (charge in excess of contract, for unnecessary services).

excess of a reasonable fee."[11] This provision was adopted on the basis of a report by Justice Spaulding that said about this standard: "The purpose of the rule 'is the simple, salutary one of prohibiting egregious overreaching of a client by his attorney'". (86a-87a). Such was the law of Massachusetts when Petitioner rendered services in 1989, and at all times until the Court in this case rejected (21a) the standard of dishonesty, bad faith or overreaching.

The incredulity that the disciplinary proceedings in this case evoked shows that informed professionals did not conceive that Petitioner's billing could be subject to discipline The then Chair of the Board of Bar Overseers recommended that the petition for discipline be dismissed without a hearing because, *inter alia*, "The bar is entitled to adequate notice that Bar Counsel intends to prosecute excessive fee cases where an attorney agrees to represent a client for a fee on an hourly basis, where he or she has fully disclosed to the client his or her lack of expertise in the area of controversy, and where he or she has handled the matter in good faith and conscientiously and free from fraud or overreaching." (37a).

When the Board ordered a hearing the Hearing Committee concluded that Petitioner's "fees were not substantially in excess of a reasonable fee." (62a). The Board of Bar Overseers then voted not to discipline, stating that "Bar Counsel has not pointed us to a single *disciplinary* case, here or

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[11] This language comes from the ABA Model Code of Professional Responsibility (1969). It is verbally more demanding than the formulation -- "A lawyer's fee shall be reasonable"--found in ABA Model Rules of Professional Conduct, rule 1.5(a)(1983), which has been adopted in some other states.

elsewhere, in which an attorney has been found to have violated the rule under circumstances such as obtain here." (68a). Earlier, ten leading trial lawyers stated under oath that Petitioner's fees were not excessive.

A lawyer should not be disciplined "on the basis of a determination after the fact that conduct is unethical if responsible attorneys would differ in appraising the propriety of that conduct." *In re Ruffalo*, 390 U.S. 544, 556 (1968) (White, J., concurring). The lack of notice is much more striking here than in *Gentile v. State Bar*, 501 U.S. 1030 (1991). There, this Court vacated a disciplinary sanction because: "A lawyer seeking to avail himself of Rule 177(3)'s protection must guess at its contours. The right to explain the 'general' nature of the defense without 'elaboration' provides insufficient guidance because 'general' and 'elaboration' are both classic terms of degree. In the context before us, these terms have no settled usage or tradition of interpretation in law. The lawyer has no principle for determining when his remarks pass from the safe harbor of the general to the forbidden sea of the elaborated." 501 U.S. at 1048-49. Here, there was a settled usage for the meaning of "clearly excessive fee" in disciplinary cases--but the Court rejected and violated that usage.

B. Massachusetts Law Legitimated Far Larger Fees Than Petitioner Charged, Including Very Large Premiums Over Hourly Charges For Successful Representation.

One precedent among those on which Petitioner should have been able to rely upheld a fee of $760,000 for a tax case in which a law firm had hourly time charges of $102,000. The Massachusetts Court upheld this as a bonus for success, although there was no contingent fee contract and no relevant customary charge, and although firm lawyers were fiduciaries

for the client. *First Nat'l Bank v. Brink*, 361 N.E.2d 406 (Mass. 1977). Other cases show comparable generosity.[12]

Massachusetts law thus gave Petitioner notice that charging his ordinary time charges--even had he not had a contract so providing--would have been wholly appropriate in view of the striking success he had achieved. Facing facts "heavily stacked against the defense", Petitioner had used a "creative" argument to suppres breathalyzer tests, had one criminal charge dismissed before trial, and after a two day trial obtained a not guilty finding on the charge of driving under the influence (5a, 40a, 44a-45a, 55a).

The Massachusett cases gave particularly clear notice of generous fee standards because they involved fees as between lawyer and client in the absence of fee contracts. It is well established that a fee set by a court normally will be less than the parties could have established by contract--and that a fee that may be set by contract will in turn fall substantially short of one warranting discipline. E.g., *Restatement of the Law Governing Lawyers* § 46, Comment a ("For a variety of reasons, discipline might be withheld for charging a fee that

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[12] *Mulhern v. Roach*, 494 N.E.2d 1327 (Mass. 1986)($350,000 fee for unusual success in eminent domain case, despite lack of contingent fee contract or time records); *Margolies v. Hopkins*, 514 N.E.2d 1079 (Mass. 1987)($18,500 fee for not more than 75 hours work by lawyer whose hourly charge was $125, despite lack of time records or fee agreement); *Cummings v. National Shawmut Bank*, 188 N.E. 489 (Mass. 1933)($5300 fee for 12-15 hours work, despite lack of fee agreement, where lawyer successfully settled case); *see Muldoon v. West End Chevrolet, Inc.*, 153 N.E.2d 887 (Mass. 1958).

would nevertheless be set aside as unreasonable in a fee-dispute proceeding."), Reporter's Note, Comment f; § 51, Comments a, c (Proposed Final Draft No. 1 1996). "A lawyer is not to be subjected to professional discipline unless the excessiveness is clear, but in the absence of an agreement as to the amount he cannot recover any amount in excess of what is fair and reasonable." *First Nat'l Bank, supra*, 361 N.E.2d at 411. Massachusetts law, granting large fees in the absence of contracts, gave no possible notice that Petitioner's fee arrangement was unenforceable--much less subject to discipline.

C. Massachusetts Law Upheld Fees Based On A Client's Consent To Hourly Billing And To The Lawyer's Good Faith Actions.

The client here agreed to pay at an hourly rate after consulting three other lawyers who offered lump sum rates. The client knew that Petitioner would have to become familiar with relevant law (41a-43a). The client evidently preferred Petitioner's billing system and approach, whether because of Petitioner's credentials, because Petitioner seemed more concerned than other lawyers, or because Petitioner did not require advance payment.

Massachusetts authority, which the Court did not mention, established that such an arrangement is proper and enforceable. *Rubin v. Taylor*, 294 N.E.2d 544 (Mass. App. 1973), cited with approval in *First Nat'l Bank, supra*, 361 N.E.2d at 412. In *Rubin*, a lawyer agreed to represent on an hourly basis a client who insisted on going to trial. The Court held that the resulting fee was enforceable "So long as the plaintiff should exert his best efforts for the defendant and conscientiously perform all that he was asked or required to do in a professional and competent manner". Precedent thus

established that Petitioner's fee contract was valid and enforceable, and *a fortiori* that it fell far short of the high standard required for discipline.

In stark contrast to previous Massachusetts law, the Court here concluded that "'[t]the test as stated in the DR 2-106 (A) is whether the fee 'charged' is clearly excessive, not whether the fee is accepted as valid or acquiesced in by the client.'" (22a). Under this retroactive ruling, no client consent--no matter how informed or how sophisticated the client--bears on whether a lawyer should be sanctioned.

D. Without Notice, The Court Limited The Number Of Paid Hours A Lawyer May Devote In Good Faith To Defending Against Criminal Charges A Client Who Wishes A Full Defense.

Petitioner was disciplined because "the amount of time [Petitioner] . . . spent to educate himself and represent Timothy was clearly excessive despite his good faith and diligence." (21a). This unprecedented holding carries the most disturbing implications for the right of a criminal defendant to have counsel of his choice defend a case in the way the client wishes.

The client here wished Petitioner "to press all reasonable avenues of defense and to pursue the case to trial" (21a), representing that he was able to pay for Petitioner's services (R. 200, 204-05, 222-23, 466-69). As a result, Petitioner pursued four motions, filing extensive memoranda, and conducted a two day trial (30a, 43a-45a). Of course, it was Petitioner's duty, unless his client directed otherwise, to take all reasonable and lawful measures for the defense of his client. He might reasonably have expected discipline had he failed to do so. *See, e.g.*, DR 6-101, 7-101. The Hearing Committee

found that the client received monthly statements and acquiesced in Petitioner's activities (45a, 53a-54a)--and the Court, without rejecting that finding, held the client's acceptance or acquiescence irrelevant (22a).

Where does this leave the determined, no-stone-unturned criminal defenses celebrated by the legal profession?[13] Is it now to be the law that a Massachusetts lawyer may provide such a defense but is forbidden to charge for it, even under a fee contract at the lawyer's usual rates, and even with the defendant's approval of the actions taken? Apparently, the meticulous representation that many business clients take for granted is now to be regarded with suspicion when provided to a client charged with driving under the influence or a comparable offense.

No reasonable lawyer, particularly one familiar with the Sixth Amendment, could have foreseen that seeking payment for time devoted "conscientiously, diligently and in good faith" (7a) to the successful representation of a criminal defendant would be considered such egregious overreaching as to warrant

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[13] Compare the fees that courts have awarded under the Independent Counsel Act just for avoiding an indictment. E.g., *In re Olson*, 884 F.2d 1415 (D.C. Cir. 1989)($861,589); *In re Meese*, 907 F.2d 1192 (D.C. Cir. 1990)($460,509).

professional discipline. Disciplining Petitioner in the circumstances of this case denied him due process of law.

CONCLUSION

For the above and foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

LAURENCE S. FORDHAM,

By: JOHN LEUBSDORF
15 Washington Street
Newark, N.J. 07102
(201) 648-5273
Counsel of Record

LAURENCE M. JOHNSON
Mahoney, Hawkes & Goldings
75 Park Plaza
Boston, Mass. 02116
(617) 457-3100
Counsel for Petitioner

HENRY P. MONAGHAN
435 West 116 Street
New York, N.Y. 10027
(212) 854-2644
Of Counsel

DANIEL COQUILLETTE
885 Centre Street
Newton, Mass. 02159
(617) 552-8650
Of Counsel

Dated: December 10, 1996

SJC-06951

IN THE MATTER OF LAURENCE S. FORDHAM.

Suffolk. April 2, 1996. - August 9, 1996.

Present: Liacos, C.J., O'Connor, Greaney, & Fried, JJ.

Board of Bar Overseers. Supreme Judicial Court, Practice of Law.
Attorney at Law, Disciplinary proceeding, Compensation, Public censure, Canons of ethics.

Information filed in the Supreme Judicial Court for the county of Suffolk on April 7, 1995.

A motion to dismiss was heard by Lynch, J., and the case was reported by him.

Arnold R. Rosenfeld, Bar Counsel.
Laurence M. Johnson for the respondent.

O'CONNOR, J. This is an appeal from the Board of Bar Overseers' (board's) dismissal of a petition for discipline filed by bar counsel against attorney Laurence S. Fordham. On March 11, 1992, bar counsel served Fordham with a petition for discipline alleging that Fordham had charged a clearly excessive fee in violation of S.J.C. Rule 3:07, DR 2-106, as appearing in 382 Mass. 772 (1981), for defending Timothy Clark (Timothy) in the District Court against a charge that he operated a motor vehicle while under the influence of intoxicating liquor (OUI) and against other related charges. Fordham moved that the board dismiss the petition and the board chair recommended that that be done. Bar counsel appealed from the chair's decision to the full board, and the board referred the matter to a hearing committee.

After five days of hearings, and with "serious reservations," the hearing committee concluded that Fordham's fee was not substantially in excess of a reasonable fee and that, therefore, the committee recommended against bar discipline. Bar counsel appealed from that determination to the board. By a vote of six to five, with one abstention, the board accepted the recommendation of the hearing committee and dismissed the petition for discipline. Bar counsel then

filed in the Supreme Judicial Court for Suffolk County (county court) a claim of appeal from the board's action.

Fordham moved in the county court for a dismissal of bar counsel's appeal. A single justice denied Fordham's motion and reported the case to the full court. We conclude that the single justice correctly denied Fordham's motion to dismiss bar counsel's appeal. We concluded, also, that the board erred in dismissing bar counsel's petition for discipline. We direct a judgment ordering public censure be entered in the county court.

We summarize the hearing committee's findings. On March 4, 1989, the Acton police department arrested Timothy, then twenty-one years old, and charged him with OUI, operating a motor vehicle after suspension, speeding, and operating an unregistered motor vehicle. At the time of the arrest, the police discovered a partially full quart of vodka in the vehicle. After failing a field sobriety test, Timothy was taken to the Acton police station where he submitted to two breathalyzer tests which registered .10 and .12 respectively.

Subsequent to Timothy's arraignment, he and his father, Laurence Clark (Clark) consulted with three lawyers, who offered to represent Timothy for fees between $3,000 and $10,000. Shortly after the arrest, Clark went to

Fordham's home to service an alarm system which he had installed several years before. While there, Clark discussed Timothy's arrest with Fordham's wife, who invited Clark to discuss the case with Fordham. Fordham then met with Clark and Timothy.

At this meeting, Timothy described the incidents leading to his arrest and the charges against him. Fordham, whom the hearing committee described as a "very experienced senior trial attorney with impressive credentials," told Clark and Timothy that he had never represented a client in a driving while under the influence case or in any criminal matter, and he had never tried a case in the District Court. The hearing committee found that "Fordham explained that although he lacked experience in this area, he was a knowledgeable and hard-working attorney and that he believed he could competently represent Timothy. Fordham described himself as 'efficient and economic in the use of [his] time.' . . ."

"Towards the end of the meeting, Fordham told the Clarks that he worked on [a] time charge basis and that he billed monthly. . . . In other words, Fordham would calculate the amount of hours he and others in the firm worked on a matter each month and multiply it by the respective hourly

rates. He also told the Clarks that he would engage others in his firm to prepare the case. Clark had indicated that he would pay Timothy's legal fees." After the meeting, Clark hired Fordham to represent Timothy.

According to the hearing committee's findings, Fordham filed four pretrial motions on Timothy's behalf, two of which were allowed. One motion, entitled "Motion in Limine to Suppress Results of Breathalyzer Tests," was based on the theory that, although two breathalyzer tests were exactly .02 apart, they were not "within" .02 of one another as the regulations require. See 501 Code Mass. Regs. §2.56(2)(1994). The hearing committee characterized the motion and its rationale as "a creative, if not novel, approach to suppression of breathalyzer results." Although the original trial date was June 20, 1989, the trial, which was before a judge without jury, was held on October 10 and October 19, 1989. The judge found Timothy not guilty of driving while under the influence.

Fordham sent the following bills to Clark:

"1. April 19, 1989, $3,250 for service rendered in March, 1989.

"2. May 15, 1989, $9,850 for services rendered in April, 1989.

"3. June 19, 1989, $3,950 for services rendered in May, 1989.

"4. July 13, 1989, $13,300 for services rendered in June, 1989.

"5. October 13, 1989, $35,022.25 revised bill for services rendered from March 19 to June 30, 1989.

"6. November 7, 1989, $15,000 for services rendered from July 1, 1989 to October 19, 1989."

The bills totaled $50,022.25, reflecting 227 hours of billed time, 153 hours of which were expended by Fordham and seventy-four of which were his associates' time. Clark did not pay the first two bills when they became due and expressed to Fordham his concern about their amount. Clark paid Fordham $10,000 on June 20, 1989. At that time, Fordham assured Clark that most of the work had been completed "other than taking [the case] to trial." Clark did not make any subsequent payments. Fordham requested Clark to sign a promissory note evidencing his debt to Fordham and, on October 7, 1989, Clark did so. In the October 13, 1989 bill, Fordham added a charge of $5,000 as a "retroactive increase" in fees. On November 7, 1989, after the case was completed, Fordham sent Clark a bill for $15,000.

Bar counsel and Fordham have stipulated that all the work billed by Fordham was actually done and that Fordham and his associates spent the time they claim to have spent. They also have stipulated that Fordham acted conscientiously, diligently, and in good faith in representing Timothy and in his billing in this case.

We consider first Fordham's contentions that bar counsel has no right to appeal from the board's decision to dismiss a petition for bar discipline and that the court lacked jurisdiction to entertain the appeal. Supreme Judicial Court Rule 4:01, §1(1), as amended, 368 Mass. 900 (1976), provides: "Any attorney admitted to, or engaging in, the practice of law in this Commonwealth shall be subject to [the Supreme Judicial Court's] exclusive disciplinary jurisdiction and the provisions of these rules. . . ." This court's right of exclusive jurisdiction over attorney disciplinary matters necessarily includes jurisdiction to review decisions of the board not to recommend discipline. If, as in the present case, there is an assertion that the board, in deciding to dismiss a petition for discipline, has misinterpreted or misapplied the disciplinary rules, which were promulgated by the court, there can be no legitimate doubt that the court has jurisdiction to review the board's interpretation and application of those rules.

Furthermore, nothing in our rules or in reason suggests that the exercise of our disciplinary powers may not be invoked by bar counsel by appealing from a decision of the board to dismiss a petition for discipline. Indeed, who, other than bar counsel, who is independent of the board and is a party to all disciplinary proceedings, S.J.C. Rule 4.01, §7(3), 365 Mass. 696 (1974) and §8(3), as amended, 415 Mass. 1304 (1993), would be entitled to challenge the board's dismissal of a petition for discipline? A complainant does not have a standing to do so. Callahan v. Board of Bar Overseers, 417 Mass. 516, 418 (1994). We conclude that, because this court has responsibility to review matters involving attorney discipline, bar counsel necessarily has a right to appeal to the court from the board's dismissal of petitions therefor and the court has jurisdiction to decide the matter.

The board dismissed bar counsel's petition for discipline against Fordham because it determined, relying in large part on the findings and recommendations of the hearing committee, that Fordham's fee was not clearly excessive. Pursuant to S.J.C. Rule 3:07, DR 2-106 (B), "a fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence, experienced in the area of the law involved, would be left with a definite and firm conviction that the fee is

substantially in excess of a reasonable fee." The rule proceeds to list eight factors to be considered in ascertaining the reasonableness of the fee:

> "(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
>
> "(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
>
> "(3) The fee customarily charged in the locality for similar legal services.
>
> "(4) The amount involved and the results obtained.
>
> "(5) The time limitations imposed by the client or by the circumstances.
>
> "(6) The nature and length of the professional relationship with the client.
>
> "(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
>
> "(8) Whether the fee is fixed or contingent."

In concluding that Fordham did not charge a clearly excessive fee, the board adopted, with limited exception, the hearing committee's report. The board's and the hearing committee's reasons for dismissing the petition are as follows: Bar counsel and Fordham stipulated that Fordham acted conscientiously, diligently, and in good faith in his representation of the client and his billing on the case.

Although Fordham lacked experience in criminal law, he is a "seasoned and well-respected civil lawyer." The more than 200 hours spent preparing the OUI case were necessary, "in part to education [Fordham] in the relevant substantive law and court procedures," because he had never tried an OUI case or appeared in the District Court. The board noted that "[a]lthough none of the experts who testified at the disciplinary hearing had ever heard of a fee in excess of $15,000 for a first-offense OUI case, the hearing committee found that [Clark] had entered into the transaction with open eyes after interviewing other lawyers with more experience in such matters." The board also thought significant that Clark "later acquiesced, despite mild expressions of concern, in [Fordham's] billing practices." Moreover, the Clarks specifically instructed Fordham that they would not consider a guilty plea by Timothy. Rather, they were interested only in pursuing the case to trial. Finally, Timothy obtained the result he sought: an acquittal.

Bar counsel contends that the board's decision to dismiss the petition for discipline is erroneous on three grounds: First, "[t]he hearing committee and the Board committed error by analyzing only three of the factors set out in DR 2-106(B)(1)-(8), and their findings with regard to these criteria do not support their conclusion that the fee in this case

was not clearly excessive"; second, the board "misinterpreted [DR 2-106's] prohibition against charging a clearly excessive fee by reading into the rule a 'safe harbor' provision"; and third, "by allowing client acquiescence as a complete defense."

In reviewing the hearing committee's and the board's analysis of the various factors, as appearing in DR 2-106 (B), which are to be considered for a determination as to whether a fee is clearly excessive, we are mindful that, although not binding on this court, the findings and recommendations of the board are entitled to great weight. Matter of Hiss, 368 Mass. 447, 461 (1975). We are empowered, however, to review the board's findings and reach our own conclusion. Matter of Anderson, 416 Mass. 521, 525 (1993). In the instant case we are persuaded that the hearing committee's and the board's determinations that a clearly excessive fee was not charged are not warranted.

The first factor listed in DR 2-106 (B) requires examining "[t]he time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly." Although the hearing committee determined that Fordham "spent a large number of hours on [the] matter, in essence learning from scratch what others . . . already know," it "[did] not credit Bar Counsel's

argument that Fordham violated DR 2-106 by spending too many hours." The hearing committee reasoned that even if the number of hours Fordham "spent [were] wholly out of proportion" to the number of hours that a lawyer with experience in the trying of OUI cases would require, the committee was not required to conclude that the fee based on time spent was "clearly excessive." It was enough, the hearing committee concluded, that Clark instructed Fordham to pursue the case to trial, Fordham did so zealously and, as stipulated, Fordham spent the hours he billed in good faith and diligence. We disagree.

Four witnesses testified before the hearing committee as experts on OUI cases. One of the experts, testifying on behalf of bar counsel, opined that "the amount of time spent in this case is clearly excessive." He testified that there were no unusual circumstances in the OUI charge against Timothy and that it was a "standard operating under the influence case." The witness did agree that Fordham's argument for suppression of the breathalyzer test results, which was successful, was novel and would have justified additional time and labor. He also acknowledged that the acquittal was a good result; even with the suppression of the breathalyzer tests, he testified, the chances of an acquittal would have been "[n]ot likely at a

bench trial." The witness estimated that it would have been necessary, for thorough preparation of the case including the novel breathalzyer suppression argument, to have billed twenty to thirty hours for preparation, not including trial time.

A second expert, testifying on behalf of bar counsel, expressed his belief that the issues presented in this case were not particularly difficult, nor novel, and that "[t]he degree of skill required to defend a case such as this was not that high." He did recognize, however, that the theory that Fordham utilized to suppress the breathalyzer tests was impressive and one of which he had previously never heard. Nonetheless, the witness concluded that "clearly there is no way that [he] could justify these kind of hours to do this kind of work." He estimated that an OUI case involving these types of issues would require sixteen hours of trial preparation and approximately fifteen hours of trial time. He testified that he had once spent ninety hours in connection with an OUI charge against a client that had resulted in a plea. The witness explained, however, that that case had involved a second offense OUI and that it was a case of first impression, in 1987, concerning new breathalyzer equipment and comparative breathalyzer tests.

An expert called by Fordham testified that the facts of Timothy's case presented a challenge and that without the suppression of the breathalyzer test results it would have been "an almost impossible situation in terms of prevailing on the trier of fact." He further stated that, based on the particulars in Timothy's case, he believed that Fordham's hours were not excessive and, in fact, he, the witness, would have spent a comparable amount of time. The witness later admitted, however, that within the past five years, the OUI cases which he had brought to trial required no more than a total of forty billed hours, which encompassed all preparation and court appearances. He explained that, although he had not charged more than forty hours to prepare an OUI case, in comparison to Fordham's more than 200 expended hours, Fordham nonetheless had spent a reasonable number of hours on the case in light of the continuance and the subsequent need to reprepare, as well as the "very ingenious" breathalyzer suppression argument, and the Clark's insistence on trial. In addition, the witness testified that, although the field sobriety test, breathalyzer tests, and the presence of a half-empty liquor bottle in the car placed Fordham at a serious disadvantage in being able to prevail on the OUI charge, those circumstances

were not unusual and in fact agreed that they were "[n]ormal circumstances."

The fourth expert witness, called by Fordham, testified that she believed the case was "extremely tough" and that the breathalyzer suppression theory was novel. She testified that, although the time and labor consumed on the case was more than usual in defending an OUI charge, the hours were not excessive. They were not excessive, she explained, because the case was particularly difficult due to the "stakes [and] the evidence." She conceded, however, that legal issues in defending OUI charges are "pretty standard" and that the issues presented in this case were not unusual. Furthermore, the witness testified that challenging the breathalyzer test due to the .02 discrepancy was not unusual, but the theory on which Fordham proceeded was novel. Finally, she stated that she thought she may have known of one person who might have spent close to one hundred hours on a difficult OUI case; she was not sure; but she had never heard of a fee in excess of $10,000 for a bench trial.

In considering whether a fee is "clearly excessive" within the meaning of S.J.C. Rule 3:07, DR 2-106 (B), the first factor to be considered pursuant to that rule is "the novelty and difficulty of the questions involved, and the skill requisite to

perform the legal service properly." DR 2-106 (B) (1). That standard is similar to the familiar standard of reasonableness traditionally applied in civil fee disputes. See Society of Jesus of New England v. Boston Landmarks Comm'n, 411 Mass. 754, 759 n.10 (1992) (reasonable hours, when calculating fees pursuant to 42 U.S.C. § 1988 [1994], requires consideration as to "whether that time was reasonable in light of the difficulty of the case and the results achieved"). See also Restatement (Third) of the Law Governing Lawyers § 46 comment f (Proposed Final Draft 1996) ("The standards that apply when fees are challenged as unreasonable in fee disputes are also relevant in the discipline of lawyers for charging unreasonably high fees"). Based on the testimony of the four experts, the number of hours devoted to Timothy's OUI case by Fordham and his associates was substantially in excess of the hours that a prudent experienced lawyer would have spent. According to the evidence, the number of hours spent was several times the amount of time any of the witnesses had ever spent on a similar case. We are not unmindful of the novel and successful motion to suppress the breathalyzer test results, but that effort cannot justify a $50,000 fee in a type of case in which the usual fee is less than one-third of that amount.

The board determined that "[b]ecause [Fordham] had never tried an OUI case or appeared in the district court, [Fordham] spent over 200 hours preparing the case, in part to educate himself in the relevant substantive law and court procedures." Fordham's inexperience in criminal defense work and OUI cases in particular cannot justify the extraordinarily high fee. It cannot be that an inexperienced lawyer is entitled to charge three or four times as much as an experienced lawyer for the same service. A client "should not be expected to pay for the education of a lawyer when he spends excessive amounts of time on tasks which, with reasonable experience, become matters of routine." Matter of the Estate of Larson, 103 Wash. 2d 517, 531 (1985). "While the licensing of a lawyer is evidence that he has met the standards then prevailing for admission to the bar, a lawyer generally should not accept employment in any area of the law in which he is not qualified. However, he may accept such employment if in good faith he expects to become qualified through study and investigation, as long as such preparation would not result in unreasonably delay or expense to his client." Model Code of Professional Responsibility EC 6-3 (1982). Although the ethical considerations set forth in the ABA Code of Professional Responsibility and Canons of Judicial Ethics are not binding,

they nonetheless serve as a guiding principle. See S.J.C. Rule 3:07, as appearing in 382 Mass. 768 (1981) (Ethical Considerations "are not adopted as a rule of this court, but those Ethical Considerations form a body of principles upon which the Canons of Ethics and Disciplinary Rules, as herein adopted, are to be interpreted").

DR 2-106 (B) provides that the third factor to be considered in ascertaining the reasonableness of a fee is its comparability to "1[t]he fee customarily charged in the locality for similar legal services." The hearing committee made no finding as to the comparability of Fordham's fee with the fees customarily charged in the locality for similar services. However, one of bar counsel's expert witnesses testified that he had never heard of a fee in excess of $15,000 to defend a first OUI charge, and the customary flat fee in an OUI case, including trial, "runs from $1,000 to $7,500." Bar counsel's other expert testified that he had never heard of a fee in excess of $10,000 for a bench trial. In his view, the customary charge for a case similar to Timothy's would vary between $1,500 and $5,000. One of Fordham's experts testified that she considered a $40,000 or $50,000 fee for defending an OUI charge "unusual and certainly higher by far than any I've ever seen before." The witness had never charged a fee of more than $3,500 for

representing a client at a bench trial to defend a first offense OUI charge. She further testified that she believed an "average OUI in the bench session is two thousand [dollars] and sometimes less." Finally, that witness testified that she had "heard a rumor" that one attorney charged $10,000 for a bench trial involving an OUI charge; this fee represented the highest fee of which she was aware. The other expert witness called by Fordham testified that he had heard of a $35,000 fee for defending OUI charges, but he had never charged more than $12,000 (less than twenty-five percent of Fordham's fee).

Although finding that Fordham's fee was "much higher than the fee charged by many attorneys with more experience litigating driving under the influence cases," the hearing committee nevertheless determined that the fee charged by Fordham was not clearly excessive because Clark "went into the relationship with Fordham with open eyes," Fordham's fee fell within a "safe harbor," and Clark acquiesced in Fordham's fee by not strenusouly objecting to his bills. The board accepted the hearing committee's analysis apart from the committee's reliance on the "safe harbor" rule.

The finding that Clark had entered into the fee agreement "with open eyes" was based on the finding that Clark hired Fordham after being fully apprised that he lacked

any type of experience in defending an OUI charge and after interviewing other lawyers who were experts in defending OUI charges. Furthermore, the hearing committee and the board relied on testimony which revealed that the fee arrangement had been fully disclosed to Clark including the fact that Fordham "would have to become familiar with the law in that area." It is also significant, however, that the hearing committee found that "[d]espite Fordham's disclaimers concerning his experience, Clark did not appear to have understood in any real sense the implications of choosing Fordham to represent Timothy. Fordham did not give Clark any estimate of the total expected fee or the number of $200 hours that would be required." The express finding of the hearing committee that Clark "did not appear to have understood in any real sense the implications of choosing Fordham to represent Timothy" directly militates against the finding that Clark entered into the agreement "with open eyes."

That brings us to the hearing committee's finding that Fordham's fee fell within a "safe harbor." The hearing committee reasoned that as long as an agreement existed between a client and an attorney to bill a reasonable rate multiplied by the number of hours actually worked, the attorney's fee was within a "safe harbor" and thus protected

from a challenge that the fee was clearly excessive. The board, however, in reviewing the hearing committee's decision, correctly rejected the notion "that a lawyer may always escape discipline with billings based on accurate time charges for work honestly performed."

The "safe harbor" formula would not be an appropriate rationale in this case because the amount of time Fordham spent to educate himself and represent Timothy was clearly excessive despite his good faith and diligence. Disciplinary Rule 2-106 (B)'s mandate that "[a] fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence, experienced in the area of the law involved, would be left with a definite and firm conviction that the fee is substantially in excess of a reasonable fee," creates explicitly an objective standard by which attorneys' fees are to be judged. We are not persuaded by Fordham's argument that "unless it can be shown that the 'excessive' work for which the attorney has charged goes beyond mere matters of professional judgment and can be proven, either directly or by reasonable inference, to have involved dishonesty, bad faith or overreaching of the client, no case for discipline has been established." Disciplinary Rule 2-106 plainly does not require an inquiry into whether the clearly excessive fee was charged to

the client under fraudulent circumstances, and we shall not write such a meaning into the disciplinary rule. See Private Reprimand PR-87-14, 5 Mass. Att'y Discipline Rep. 501, 502 (1987) (violation of DR 2-106[A] and [B], as appearing in 382 Mass. 772 [1981] found even where "no evidence of bad faith on the part of respondent"); Matter of the Discipline of an Attorney, 2 Mass. Att'y Discipline Rep. 115, 117 (1980) (violation of DR 2-106 [A] and [C], as appearing in 382 Mass. 772 [1981] even though no "overreaching or improper motivation").

Finally, bar counsel challenges the hearing committee's finding that "if Clark objected to the numbers of hours being spent by Fordham, he could have spoken up with some force when he began receiving bills." Bar counsel notes, and we agree, that "[t]he test as stated in the DR 2-106 (A) is whether the fee 'charged' is clearly excessive, not whether the fee is accepted as valid or acquiesced in by the client." Therefore, we conclude that the hearing committee and the board erred in not concluding that Fordham's fee was clearly excessive.

Fordham argues that our imposition of discipline would offend his right to due process. A disciplinary sanction constitutes "a punishment or penalty" levied against the respondent, and therefore the respondent is entitled to

procedural due process. In re Ruffalo, 390 U.S. 544, 550 (1968). Matter of Kenney, 399 Mass. 431, 436 (1987) ("attorney has a substantial property right in his license to practice law"). Fordham contends that the bar and, therefore, he, have not been given fair notice through prior decisions of this court or the express language of DR 2-106 that discipline may be imposed for billing excessive hours that were nonetheless spent diligently and in good faith. Commonwealth v. Sefranka, 382 Mass. 108, 110 (1980), quoting Connally v. General Constr. Co., 269 U.S. 385, 391 (1926) ("An essential principle of due process is that a statute may not proscribe conduct 'in terms so vague that men of common intelligence must necessarily guess at its meaning'"). It is true, as Fordham asserts, that there is a dearth of case law in the Commonwealth meting out discipline for an attorney's billing of a clearly excessive fee. There is, however, as we have noted above, case law which specifically addresses what constitutes an unreasonable attorney's fee employing virtually the identical factors contained within DR 2-106. See Mulhern v. Roach, 398 Mass. 18, 25-30 (1986); McLaughlin v. Old Colony Trust Co., 313 Mass. 329, 335 (1943); Cummings v. National Shawmut Bank, 284 Mass. 563, 569 (1933). See also Beatty v. NP Corp., 31 Mass. App. Ct. 606, 611 (1991) ("factors. . . to be

considered in determining whether a lawyer's fee is fair and reasonable have been amply discussed in the cases"). More importantly, the general prohibition in DR 2-106 (A) that "[a] lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee," is followed by eight specific, and clearly expressed, factors, to be evaluated by the standard of "a lawyer of ordinary prudence," in determining the propriety of the fee. Contrast Gentile v. State Bar of Nev., 501 U.S. 1030, 1049 (1991), quoting Grayned v. Rockford, 408 U.S. 104, 112 (1972) (grammatical structure of attorney disciplinary rule and lack of clarifying interpretation by State court forced attorney to "guess at [the rule's] contours" thus failing to "provide 'fair notice to those to whom [it] is directed'"). In addition, nothing contained within the disciplinary rule nor within any pertinent case law indicates in any manner that a clearly excessive fee does not warrant discipline whenever the time spent during the representation was spent in good faith. The fact that this court has not previously had occasion to discipline an attorney in the circumstances of this case does not suggest that the imposition of discipline in this case offends due process. See Commonwealth v. Twitchell, 416 Mass. 114, 123, 125 n. 13 (1993) (defendants not deprived of "fair warning" that

particular conduct was proscribed by penal statute where criminal liability depended on "degree" of conduct); Matter of Saab, 406 Mass. 315,
324 n.13 (1989) (absence of codified standards to govern attorney discipline proceedings does not offend due process). We reject Fordham's due process argument.

In charging a clearly excessive fee, Fordham departed substantially from the obligation of professional responsibility that he owed to his client. The ABA Model Standards for Imposing Lawyer Sanctions § 7.3 (1992) endorses a public reprimand as the appropriate sanction for charging a clearly excessive fee. We deem such a sanction appropriate in this case. Accordingly, a judgment is to be entered in the county court imposing a public censure. The record in this case is to be unimpounded.

So ordered.

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH,

AT BOSTON, August 9, 1996

IN THE CASE No. SJC-6951

IN THE MATTER OF LAURENCE S. FORDHAM

pending in the Supreme Judicial Court for the County of Suffolk

No. BD-95-031

ORDERED, that the following entry be made in the docket; viz., -

A judgment is to be entered in the county court imposing a public censure. The record in this case is to be unimpounded.

BY THE COURT,

/s/ Susan Mellen, Asst. CLERK

August 9, 1996

COMMONWEALTH OF MASSACHUSETTS
BOARD OF BAR OVERSEERS
OF THE SUPREME JUDICIAL COURT

BAR COUNSEL, Petitioner	]	
V.	]	
LAURENCE S. FORDHAM, ESQ., Respondent	]	BBO File No. C1-90-557J

MEMORANDUM OF DECISION AND RECOMMENDATION

On March 11, 1992, Bar Counsel filed a Petition For Discipline against the respondent alleging a violation of Supreme Judicial Court Rule 3:07, Canon Two, DR 2-106 (A) and (B) which prohibits an attorney from charging a "clearly excessive fee." The respondent filed an Answer, Motion To Dismiss and Motion For Summary Judgment. In support of his Motion For Summary Judgment, respondent filed a series of affidavits from well-known and respected attorneys together with an extensive Memorandum of Law. Bar Counsel also filed a Memorandum of Law and two Counter-Affidavits. Oral

argument was held on the respondent's two dispositive motions.

Procedural Issue.

Before proceeding to the merits, a preliminary determination is required as to whether the respondent's dispositive motions are proper in bar disciplinary proceedings where not specifically authorized by court rule.

Bar disciplinary proceedings are neither criminal nor civil in nature, although there are similarities to both. In criminal and civil proceedings, dispositive motions are permitted by court rule and routinely filed. Both fairness to the parties and effective use of judicial resources encourage the use of these motions where appropriate. Clearly, a motion to dismiss a defective petition for discipline cannot logically be opposed on procedural grounds. Bar Counsel does not contend otherwise. A motion for summary judgment, however, raises issues outside of the petition itself, and one could argue is not permissible in bar discipline proceedings unless specifically authorized by court rule. We need not, however, decide this question in the context of this proceeding where the material

facts are undisputed.[1] In these circumstances the form of the motion should not be decisive. The respondent's position is simply that based on the undisputed facts, the Petition For Discipline should be dismissed. He is entitled to a determination of that issue.

Undisputed Facts.

The respondent was admitted to the bar of the Commonwealth in 1957. Following his clerkship with the United States Supreme Court, he joined a prominent Boston law firm where he became managing partner from 1972 through 1981. In 1985 he founded with others the firm of Fordham & Starrett, where he continues to practice. The respondent taught professional responsibility at Harvard Law School for two years and is an experienced litigator. He has no record of prior discipline.

In March 1989, the respondent was retained by Laurence E. Clark, the complainant, to represent his son, Timothy Clark, on charges of driving under the influence, operating a motor vehicle after suspension, speeding, and operating an unregistered motor vehicle. The complainant

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[1] The responses to questions by the parties during oral argument and the pleadings clearly indicated there is no disputed material fact for the purpose of deciding whether this proceeding should be dismissed.

knew the respondent was not a criminal lawyer but nevertheless wished to retain him. The respondent indicated that he would charge for his services on a time basis at a rate of $250.00 per hour for his time, and $100.00 per hour for the time of an associate who would work on the case. These terms were accepted by the complainant. The respondent represented the complainant in a professional and competent manner throughout the criminal proceedings. He filed pretrial motions and extensive memoranda. The case was tried before a judge in the Concord District Court over a two-day period. The defendant was found not guilty of driving under the influence.

The respondent sent monthly bills to the complainant indicating the time spent on the case. Neither respondent's actual time expenditure nor the quality of his work was questioned by the complainant. At all times the respondent performed his services conscientiously and in good faith. There is no allegation by Bar Counsel of fraud, overreaching or unconscionable behavior by the respondent. The time spent by the respondent is actually accounted for and was believed by him to be necessary to achieve a satisfactory result.

The respondent's total billing was $50,225.00. When the complainant failed to pay respondent's total bill, the respondent brought a civil action against the complainant. The

complainant defaulted, and judgment entered against him. The default was removed by agreement and the dispute has been referred to fee arbitration, where it is now pending. Complainant filed the present disciplinary complaint after respondent sued him for collection of his fee.

It is Bar Counsel's position that the time spent by respondent "was substantially in excess of that which a lawyer of ordinary prudence would spend in preparation of this type of case." Bar Counsel further alleges that the "fee customarily charged by an attorney for the type of case in the district court is less than $10,000." Bar Counsel argues that the issues raised by the respondent in his motions are factual and should be decided by reference to a hearing committee.

Discussion.

A. Specific Charges of Misconduct.

The respondent first challenges the petition for discipline for lack of specificity. A petition for discipline must give an attorney sufficient notice of the alleged misconduct. In this case, the petition, although perhaps not as specific as it could be, is adequate to put respondent on notice of the alleged charges against him.

In addition, for over a year Bar Counsel and the respondent have been in frequent contact with each other in an

effort to resolve this matter. Their respective positions have been fully disclosed to each other, as is readily apparent from a reading of the respondent's brief.

What perhaps is of more concern is the standard of misconduct alleged in the petition. The petition does not allege that the respondent spent excessive time in this particular case but instead bases the allegation of misconduct in a comparison of the time that a typical lawyer would have devoted to a similar case. In my view, the proper standard in judging the lawyer's alleged misconduct for charging an excessive fee is a careful examination of the services performed in the particular case, not in a typical case. I am satisfied, however, from the oral argument that Bar Counsel in fact agrees with this position and has used the correct standard in bringing and prosecuting this disciplinary proceeding.

B. The Ruffalo Argument.

The respondent argues that the standard for determining ethical misconduct is best stated in Justice White's concurring opinion in In Re Ruffalo, 390 U.S. 544 (1968). That opinion approves disciplinary action involving "conduct which all responsible attorneys would recognize as improper for a member of the profession." 390 U.S. at 555. Ruffalo entirely proscribes disciplinary action "on the basis of a determination

after the fact that conduct is unethical if responsible attorneys would differ in appraising the propriety of that conduct." 390 U.S. at 556. The respondent then reasons that DR 2-106 (A) and (B) (charging a clearly excessive fee) is a general disciplinary rule which is open to differences of opinion by responsible attorneys and, therefore, provides no foundation for imposing discipline. The respondent has filed numerous affidavits in support of his position. Respondent's argument may well apply to particular conduct in catch-all rules that do not describe particular conduct such as DR 1-102 (A)(5) and (6) (a lawyer shall not engage in conduct that is prejudicial to the administration of justice or in other conduct that adversely reflects on his fitness to practice law). It does not, however, have merit in its application to the excessive fee rule which is a specific rule. Therefore, in my view the Ruffalo rule has no application in a disciplinary proceeding alleging misconduct under DR 2-106 (A) and (B).

C. The term "excessive fee".

DR 2-106 (B) states that:

> "A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence, experienced in the area of the law involved,

> would be left with a definite and firm conviction that the fee is substantially in excess of a reasonable fee."

The rule then sets forth "factors to be considered as guides in determining the reasonableness of a fee." [Emphasis Supplied]. It is apparent from reading the rule that the standard for imposing discipline for charging an excessive fee is much higher than that governing the client's civil liability for charging an unreasonable fee. This distinction was clearly noted by the Illinois Supreme Court in In Re. Kutner, 78 Ill. 2d 157 (1979), 399 N.E. 2d 936, 965, a leading case involving discipline for charging an excessive fee.

In that case the court stated:

> "The Supreme Court of Washington faced a similar argument in the case in In Re. Greer, (1963) 61 Wash. 2d 741, 380 P. 2d 482. In response to the respondent's contention that the issue of reasonableness of fees is a problem for the civil courts and ought not to form the basis for a disciplinary proceeding, the Washington Supreme Court stated, 'while a determination that a fee is reasonable or unreasonable is appropriate only to a civil court, where the fee retained or demanded

> can be considered to be unconscionable, it is a matter for a disciplinary proceeding.'"

The court continued:

> 'Where . . . ethical considerations take us from one end of the spectrum marked 'reasonable' through categories designated successively, inordinate, exorbitant, and unconscionable, we move in a direct line from the civil arena into a disciplinary forum.' (61 Wash. 2d 741, 750, 380 P. 2d 482, 487).

The California Supreme Court has held that the test as to whether a fee is excessive is whether the fee is "so exorbitant and wholly disproportionate to the services performed as to shock the conscience." Bushman v. State of California, 11 Cal. 3d 558, 563, 111 Cal. Rptr. 904, 406, 522 P. 2d 312, 314 (1974). In note 137 to the ABA Code (1976 Edition), the discipline standard for fees has also been stated as follows:

> "An attorney has the right to contract for any fee he chooses so long as it is not excessive ... and this committee is not concerned with the amount of such fees unless so excessive as to constitute a misappropriation of the

client's funds ..." American Bar Association Opinion 320 (1968).

Bar Counsel argues, however, that the application of these standards and the standards in the rule itself are issues of fact to be determined by a hearing committee and are therefore not subject to dismissal by motion where counter-affidavits submitted by Bar Counsel allege respondent's fee is "grossly excessive at best" and "extremely excessive." I do not agree with this argument in the context of this proceeding. The issue is whether the respondent on the undisputed material facts in this case should be required to defend the disciplinary proceeding.

The purpose of ethical rules is to protect the public, not to remedy a wrong against a client. "The ethical rules spring from the belief that certain kinds of behavior cannot be tolerated by a society of professionals." McKenzie Const. Inc. v. Maynard, 758 F. 2d 97 (3d Cir.) 1985. Here the respondent entered into a fee agreement with a client after full disclosure of the conditions under which he would be retained. The client was aware of his hourly time charges and that he did not customarily handle criminal cases. The respondent performed his services in good faith and conscientiously. Under DR 6-101 (A)(2) and DR 7-101 (A)(1) he was prohibited from

handling the criminal defense "without preparation adequate in the circumstances" or failing "to seek the lawful objectives of [his] client through reasonable available means." There is no indication that he did otherwise. In my view, the rule of law is a rule of fairness and the dispositive question in deciding a disciplinary proceeding always should be whether what we are doing is fair. I am of the opinion that limited to the facts in this proceeding, where it is agreed that the respondent did not expend excessive time deliberately or in bad faith the petition for discipline should be dismissed. To read the disciplinary rule otherwise would not be consistent with fundamental fairness. I am further of the opinion that if I am wrong in this premise, then this proceeding should also be dismissed on another ground. The bar is entitled to adequate notice that Bar Counsel intends to prosecute excessive fee cases where an attorney agrees to represent a client for a fee on an hourly basis, where he or she has fully disclosed to the client his or her lack of expertise in the area of controversy, and where he or she has handled the matter in good faith and conscientiously and free from fraud or overreaching. An attorney's professional reputation is too important an asset to require less.

I recommend the dismissal of the Petition For Discipline.

/s/ James R. DeGiacomo
Chairman

August 10, 1992

COMMONWEALTH OF MASSACHUSETTS

BBO FILE NO. Cl-90-557J

BAR COUNSEL,	)
VS.	)
LAURENCE S. FORDHAM	)

HEARING COMMITTEE'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION FOR DISCIPLINE

I. STATEMENT OF THE CASE.

On February 26, 1992, Bar Counsel filed a Request to Proceed with Formal Charges alleging that the respondent, Laurence S. Fordham ("Fordham"), had charged a clearly excessive fee in violation of Canon Two, Disciplinary Rule 2-106. The request was approved by a member of the Board of Bar Overseers, and a Petition for Discipline was served on the

respondent on March 11, 1992. Hearings were held on March 23, 24, 25, 26 and September 20, 1993. Final briefing was completed at the end of November, 1993. According to Bar Counsel's Petition, Fordham charged excessive fees in connection with his representation of Timothy Clark ("Timothy") in an operating under the influence matter and other related motor vehicle violations.

II. FINDINGS OF FACT.

On March 4, 1989, Timothy, then twenty-one years old, was arrested by the Acton Police Department on charges of driving under the influence, operating a motor vehicle after suspension, speeding, and operating an unregistered motor vehicle. Tr. I at 58; Ex. 2. At the time of his arrest at 3:30 A.M., Timothy was returning home from a party. Tr. I at 74. In his car, the Acton police found an open quart bottle of vodka which was one-half to two-thirds empty. Tr. I 74-75. Timothy failed the field sobriety test and was taken to the Acton Police station. At the Acton Police station, Timothy registered readings of .10 and .12 on the breathalyzer tests. Ex. 5.

Shortly after the time of Timothy's arrest, his father, Laurence Clark ("Clark") went to Fordham's home in order to service an alarm system which he had installed several years before. At the Fordham home, Clark discussed his son's arrest with Harriet Fordham, Fordham's wife. Tr. I at 156. Harriet Fordham (also a lawyer) asked Clark if he wanted to discuss the case with Fordham. Clark and Fordham set up a meeting on March 19, 1989, at Fordham's home. Tr. I at 157-158. Tr. II at 16.

After Timothy's arrest and before the meeting with Fordham, the Clarks consulted with three other attorneys, John Mee of Boston, Ken Quat of Maynard, and Thomas McCarthy of Concord. These attorneys quoted fees of between $3,000 to $10,000 to represent Timothy. Clark understood these fees to be flat fees with possible additional costs for expenses. Clark may have confused "flat fee" arrangements with retainers. Tr. I at 60-65. Tr. II at 217-221; Tr. I at 82.

The initial meeting with Timothy, Clark and Fordham at Fordham's house lasted approximately two hours. Tr. II at 159-160. At the meeting Timothy described the incidents leading to his arrest and the charges against him. Tr. I at 159. Fordham informed the Clarks that he had never represented a

client in a criminal case or a driving under the influence case. Tr. I at 161; Tr. II at 29; Ex. 10 at para. 5. Fordham also told the Clarks that he had never tried a case in the state District Court system. Id. Fordham explained that although he lacked experience in this area, he was a knowledgeable and hard-working attorney and that he believed he could competently represent Timothy. Fordham described himself as "efficient and economic in the use of [his] time." Ex. 10, para. 5; Tr. II at 29.

Toward the end of the meeting, Fordham told the Clarks that he worked on time charge basis and that he billed monthly. Tr. I at 201. In other words, Fordham would calculate the amount of hours he and others in his firm worked on a matter each month and multiply it by the respective hourly rates. He also told the Clarks that he would engage others in his firm to prepare the case. Clark had indicated that he would pay Timothy's legal fees. Tr. I at 71.

There was inconsistent testimony concerning whether Fordham advised the Clarks specifically about his hourly rate at that first meeting. Clark testified that Fordham quoted an hourly rate of $200 for his work and $100 per hour for associates. Tr. I at 160; Ex. 10 at p.3. Fordham testified that

he did not discuss his hourly rate at the first meeting, in part because he did not at the time know his hourly rate. Tr. II at 27-28. Fordham and Clark agreed that there was to be a 10% discount for prompt payment of bills. Tr. I at 160; Ex. 10, para. 5.

Clark indicated his interest in keeping the fees down. In addition to the 10% discount, Fordham told Clark that he could reduce his expenses by performing services in the case, such as filing papers with the court. Fordham also indicated that during court appearances he would, whenever practical, work on other cases to save the Clarks from being billed for time Fordham spent waiting for the case to be heard. Tr. II at 45-46. The Clarks made no agreement to retain Fordham at the March 19, 1989 meeting. Later that day, however, Clark called Fordham and asked him to represent Timothy. Tr. I at 163-164. Tr. II at 50.

As part of his strategy, Fordham decided to pursue four notions in the District Court. Tr. II at 55; Ex. 5. Briefly, that work entailed the following:

1. Motion to Dismiss Civil Motor Vehicle Charges. The motion asserted that all civil motor vehicle

charges should be dismissed because no show cause hearing was held. The motion was denied.

2. Motion to Dismiss Civil Motor Vehicle Charges Against Timothy. This motion concerned the charges of operating a motor vehicle after suspension of a driver's license. The motion countered that Timothy never received notice of his suspended license. The motion was allowed.

3. Motion to Dismiss Charge of operating a Motor While Under the Influence of Intoxicating Liquor, or Alternatively to Suppress Results of Breathalyzer Tests. This motion was based on Timothy's representation to Fordham that the arresting officers had failed to read him his rights. On the day of the motion, Timothy refused to testify in contradiction to the arresting officers and Fordham withdrew the motion.

4. Motion In Limine to Suppress Results of Breathalyzer Tests. This motion was allowed on the theory that the two breathalyzer readings were not within .02 of each other. Expert testimony revealed that this argument was a creative, if not novel, approach to suppression of breathalyzer results.

In addition to the four motions, Fordham also prepared for and tried the case before a judge in the Concord District Court. The judge found that Timothy was not guilty of driving

under the influence. Ex. 1. In connection with this trial, Fordham made several court appearances. The original trial date was set for June 20, 1989. The trial was continued to October 10, 1989. The trial commenced on that date and was completed October 19, 1989.

Fordham sent the following bills to Clark:

1. April 19, 1989, $3,250 for services rendered in March, 1989.

2. May 15, 1989, $9,850 for services rendered in April, 1989.

3. June 19, 1989, $3,950 for services rendered in May, 1989.

4. July 13, 1989, $13,300 for services rendered in June, 1989.

5. October 13, 1989, $35,022.25 revised bill for services rendered from March 19 to June 30, 1989.

6. November 7, 1989, $15,000 for services rendered from July 1, 1989 to October 19, 1989.

These bills were simple one-line statements "For Professional Services" without time detail or other supporting information. Ex. 3. The parties have stipulated that all work

billed by Fordham was actually done and that Fordham and his associates spent the time indicated on the printouts. Tr. Vol I, p. 24; Joint Memorandum at p.3 (uncontested facts). The parties also stipulated that Fordham acted conscientiously, diligently and in good faith in his representation of the client and his billing for this case. Tr. I at pp. 25-6; Respondent's Pre-Trial Memorandum at para. E.

Clark did not pay the first two bills when they became due. Clark expressed his concern about the amount of the bills to Fordham at two court appearances on June 10 and June 20, 1989. However, on the first scheduled day of the trial, June 20, 1989, he paid Fordham $10,000. Fordham assured Clark that most of the work on the case, other than taking it to trial, had been completed. Tr. I at 175-6; Tr. II at 72, 79-80; Tr. V at 90-91. After June of 1989, Clark did not pay any of the bills. Clark testified that he was depressed and shocked by the amount of the bills, and could not react to them. Tr. I at 197.

On August 29, 1989, Fordham sent Clark a letter informing him that the unpaid balance of the bills was $20,535.57. Ex. 16. Clark did not respond to the letter. Finally, on September 27, 1989 Clark and Fordham discussed the unpaid bills. Fordham requested that Clark sign a

promissory note evidencing his debt to Fordham's firm. Ex. 6. In his letter, Fordham encouraged Clark to seek advice of counsel before signing the note. Ex. 6. Clark agreed and signed a note on or about October 7, 1989. Ex. 9, para. 26; Tr. II at 95; Ex. 6.

On October 13, 1989, Fordham sent Clark a revised bill for services rendered between March 19, 1989 and June 30, 1989. The bill acknowledged payment of $10,000 on June 20, 1989. The bill also included an additional charge of approximately $5,000 which represented a retroactive increase for each of the previous monthly bills. Tr. II at 95. The bill did not explain the $5,000 retroactive increase in fees. Ex. 3. The $5,000 figure did not equal the 10% discount earlier discussed as the total outstanding fee at the time was $35,000. Ex. 3. In the letter that accompanied the bill, Fordham enclosed a promissory note for the signature of Clark's wife. Ex. 3.

The total charge for Fordham's representation of Timothy was $50,022.25. This total included one hundred fifty-three (153) hours of Fordham's time and seventy-four (74) hours of Fordham's associates' time, for a total of two hundred twenty-seven (227) hours. Ex. 4.

III. RULINGS OF LAW AND RECOMMENDATION FOR DISCIPLINE.

Based on these facts, Bar Counsel asserts that Fordham violated Disciplinary Rules 2-106(A) and (B), which provide:

> (A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.
>
> (B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence, experienced in the area of the law involved, would be left with a definite and firm conviction that the fee is substantially in excess of a reasonable fee.

Disciplinary Rules 2-106 (B) (1) - (8) set out factors to consider when determining whether a fee is reasonable. These factors include:

> (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
>
> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
>
> (3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent.

Determining whether a fee is substantially in excess of a reasonable fee is a question of fact. First Nat'l Bank v. Brink, 372 Mass. 257, 263-264 (1977). The factors set out in DR 2-106 (B) (1) - (8) should be considered, but no one factor is determinative of whether the fee is excessive. Mulhern v. Roach, 398 Mass. 18, 24 (1986). The weight given each factor varies according to the facts and circumstances of each case. See McLaughlin v. Old Colony Trust Co., 313 Mass. 329, 335 (1943).

It is undisputed that Clark's legal bills were much higher than the fees charged by many attorneys with more experience litigating driving under the influence cases. See DR 2-106 (B) (3) (fee customarily charged in locality). Expert

witnesses on behalf of Bar Counsel, Attorneys Michael Dwyer and Richard Zisson, were knowledgeable and credible experts in the trial of cases charging driving under the influence. Both Mr. Zisson and Mr. Dwyer were highly specialized in their handling of such cases. They testified that fees for driving under cases vary widely, but neither had heard of a fee in excess of $15, 000 for a first offense. Tr. IV at 125; Tr. III at 131.

Expert witnesses on behalf of Fordham, Attorneys Harold Hestnes and Carol Ball, testified that the time and amount charged for the case was reasonable considering the difficulty of the case and the Clarks' insistence that the matter be fully litigated. Tr. IV at 152, 207; Tr. V at 123. Even Fordham's experts, however, testified that they had never participated in a driving under the influence case that resulted in over $50,000 in fees and over 200 hours of preparation. Attorney Ball, for example, testified that she considered $40,000-$50,000 for a driving under the influence case an unusually high fee. Tr. V at 123. Attorney Hestnes, who charged an hourly rate of $275, admitted that he had never tried a driving under the influence case for more than $12,000 in fees or over 40 hours of preparation. Tr. IV at 168, 199.

The experts presented by Bar Counsel on the one hand and Fordham on the other presented definite contrasts. Bar Counsel's experts were essentially sole practitioners who spent a very significant part of their practices in the specific field of defending charges of driving under the influence. Mr. Zisson had written and taught seminars on defense of these cases. Tr. IV at 7.

On the other hand, Fordham's experts spent a smaller percentage of their time on driving under cases. A number of Fordham's experts were from large firms, as was Mr. Hestnes. These lawyers tended to handle a wide variety of work and tried one or two driving under the influence cases per year.[1]

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[1] The panel heard live testimony from two experts from each side. Bar Counsel offered the testimony of one additional expert. Mr. Fordham's counsel sought to present live testimony from nine additional experts. The panel received from Respondent Affidavits executed by five of those additional experts: Robert W. Meserve of Palmer & Dodge, Samuel Adams of Warner & Stackpole, James D. St. Clair of Hale & Dorr, John J. Curtin of Bingham, Dana & Gould, and Robert J. Muldoon of Sherin & Lodgen. The panel found that the anticipated testimony was duplicative. The panel limited both sides to two experts each, and indicated that additional expert testimony would be received by Affidavit. Tr. I at 9-10. Mr. Fordham's counsel submitted Affidavits from the above-named additional experts. See Ex. 27-31. The panel has

Bar Counsel urges that we should judge Fordham's fees by the standards articulated by Zisson and Dwyer because they are "experienced in the area of the law involved," and testified that no lawyer so experienced would ever charge even close to the $50,000 charged by Fordham. Bar Counsel asserts that the absolute number of hours spent by Fordham was clearly excessive. There can be no doubt that Fordhan and others at his firm spent large number of hours on this matter, in essence learning from scratch what others such as Mr. Zisson and Mr. Dwyer already know.

We cannot, however, agree with Bar Counsel on the facts of this case. Whatever services Clark might have obtained elsewhere at far lower cost, he went into the relationship with Fordham with open eyes. Clark had interviewed other lawyers who, like Mr. Zisson and Mr. Dwyer, were highly expert in the specialized area of defense of driving under the influence cases. Tr. I at 61-64. These lawyers quoted fixed fees as Mr. Zisson or Mr. Dwyer would have. Id. At the outset, Fordham frankly admitted, and Clark

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considered and weighed those Affidavits as though they were live testimony.

understood, that these other lawyers were much more familiar than Fordham was with driving under cases. Tr. I at 203. Clark knew that Fordham had never before defended such a case and would have to become familiar with the law in that area. Tr. I. 201-202.[2]

Further, if Clark objected to the numbers of hours being spent by Fordham, he could have spoken up with some force when he began receiving bills. Instead, Clark allowed Fordham to continue, indicating acquiescence in Fordham's billing practices. Clark's mild expressions of concern in June, 1989 were contradicted by his $10,000 payment, his continued acceptance of Fordham's services and his failure to object in writing or by forceful verbal comment. By his own admission, Clark retreated into his shell and attempted to ignore the mounting problem. Fordham was not placed on notice that

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[2] Despite Fordham's disclaimers concerning his experience, Clark did not appear to have understood in any real sense the implications of choosing Fordham to represent Timothy. Fordham did not give Clark any estimate of the total expected fee or the number of $200 hours that would be required. Tr. II at 49.

Clark objected in any real sense to his fees or his billing practices.

We do not credit Bar Counsel's argument that Fordham violated DR 2-106 by spending too many hours. The parties have stipulated that all of the hours were actually spent. Joint Memorandum at p. 3 (uncontested facts). They have stipulated that the time was spent "conscientiously, diligently and in good faith." Tr. I at 25-26. The fact that Bar Counsel, Mr. Zisson, Mr. Dwyer, or even members of this panel may find the hours spent to be wholly out of proportion does not require us to find that the fee was "clearly excessive." When the Clarks met with Fordham, they emphasized that Timothy did not want to plead guilty and accept an alcohol rehabilitation program as a term of probation, even though they had been advised to do so by the other attorneys they consulted before Fordham. Tr. I at 61, 79-80, 91-93; Tr. II at 24, 38-39. Clark informed Fordham that he was concerned about his son's future and that he wanted to support him fully in the defense of this case. Tr. II at 118. Clark felt that the other attorneys were only interested in their fees, and that they weren't concerned for Timothy's welfare. Tr. II at 50. See DR 2-106(B)(6) (nature of professional relationship with client).

Although Fordham also advised the Clarks of the benefits of pleading guilty and accepting an alcohol education program, he was instructed to pursue the case to trial. See DR 2-106(B)(4) (amount involved). Accordingly, Fordham zealously pursued every avenue of defense available to Timothy in order to obtain a dismissal of the charges. See Rubin v. Taylor, 1 Mass. App. Ct. 208, 212 (1973) (no excessive fees where client insisted on protracted litigation despite advice of counsel). He immediately filed the series of motions discussed above. Finally, after a successful motion to suppress the breathalyzer analysis and a trial, Fordham obtained a finding of not guilty for Timothy. Ex 1. Given the evidence against Timothy, including the breathalyzer, a two-thirds empty bottle of vodka and a failed sobriety test, this was a significant result. See DR 2-106(B)(4) (results obtained).

In fact, Clark received much of what he bargained for. He retained a very experienced senior trial attorney with impressive credentials. That lawyer paid direct personal attention to the matter and, most importantly, obtained a not guilty verdict on a serious charge where the facts were heavily stacked against the defense. We must give substantial weight

to "results obtained" as one of the factors we consider under DR 2-106(B)(4).

In sum, we conclude that Fordham expressly disclosed his fee arrangement with the Clarks. Clark was sent regular bills for each month in which significant work was performed on the case. Fordham was encouraged to press all reasonable avenues of defense and to pursue the case to trial. Although he was in frequent contact with Fordham, Clark did not dispute any bills until over $35,000 in fees had accumulated. We find compelling Clark's testimony that he was too stunned by the bills to act appropriately, but it does not override his express acceptance of the terms of Fordham's representation of his son.

Although we find that Fordham did not charge a fee that was substantially in excess of a reasonable fee, we reach that conclusion with serious reservations. Fordham survives the pitfalls of DR 2-106 because he had a straightforward arrangement with Clark - his hourly rate times the number of hours. The hourly rate was reasonable and was a "safe harbor" as described by Fordham. Ex. G, p. 10. See Rubin v. Tayler, 1 Mass. App. 208, 212 (1973). Fordham actually spent in conscientious fashion all the hours claimed, and Clark knew

but hardly complained as Fordhan successfully pressed expensive motions and strategies.

However, if Fordham is protected by the simple hourly rate times number of hours approach, he must stick with it. He did not. We do not find credible Fordham's explanation of the additional charges in the October 13 and November 7 bills. Tr. V at 184-185, 203-207; Ex 8. Fordham never told Clark that he was removing retroactively his 10% discount on the bills. Even though Fordham added approximately $5,000 to Clark's bill, he made no reference to the additional amounts due in his letter accompanying the revised bill on October 13, 1989. Ex 3. We find this omission incredible, considering the difficulty Fordham was experiencing getting any payment from Clark for the original bills.

In addition, the $5,000 amount added back into the bills in October was not equal to the 10% earlier discounted. Fordham admitted that the amount added to the bills was actually closer to 14% or 15%. Tr. V at 198. When pressed, Fordham claimed that he added a higher discount figure because he subsequently discovered that he had been writing off more than he realized and more than the 10% he discussed with the Clarks. Tr. V at 196-97.

We also do not find credible Fordham's explanation of the additional $2,004.00 on the November 7, 1989 bill. Fordham's explanation that he "recalculated" his services because his hourly rate had increased during his representation of Timothy or that he charged additional fees for alleged combat pay, including work on weeknights and weekends, is not supported by the record. Fordham admitted that he unilaterally added a "moderate adjustment" to the November 7, 1989 bill. Tr. V at 200-01. In determining the amount, Fordham testified that "[he] didn't fix a dollar hourly amount in [his] mind." Tr. V at 200.

As to the $2,004, we find that Fordham arbitrarily charged an additional fee for a good result obtained in Timothy's case. If charging an additional fee for good results may be appropriate when it is fully disclosed in advance to the client, we find it troubling under the circumstances of this case. When Fordham first agreed to represent the Clarks, he expressly told them that he would charge an hourly fee. Fordham never mentioned to the Clarks at any time in his representation that he might charge an additional fee for good results. Moreover, Fordham submitted this additional fee even though he had just removed the discount from his bills in order

to charge for the full amount of his services. As with revocation of the 10% discount, Fordham did not inform Clark that he was adding a $2,000 premium to time charges. In light of the fact that Fordham, his partners and associates logged 227 hours on the case and had already billed over $40,000, to add a $2,000 "good results" fee presses the outside limits of permissible conduct.

Had Bar Counsel proceeded throughout on the theory that Fordham violated DR 2-106 by adding a $2,000 premium and overcharging for a retroactive elimination of the discount, we would be hard pressed to disagree. The $50,000 fee is truly enormous, escaping discipline only because Clark agreed to the hourly rate and the hours were diligently spent. To add arbitrarily $2,000 for "combat pay" seems to us to go beyond the acceptable boundary.[3] Any combat pay was generously covered by the $50,000 fee. Once we get beyond the simple

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[3] Even one of Fordham's own experts indicated doubt as to whether a premium would be fair in these circumstances. Tr. V at 156.

hourly rate times number of hours diligently spent, this $50,000 fee is very difficult to justify.[4]

However, we do not believe that Bar Counsel gave Fordham fair notice that he would press the point. Bar Counsel repeatedly, and most particularly in his opening, said:

> "[T]his is what the crux of this case is all about, the number of hours that were spent preparing and trying this case are substantially in excess of what a lawyer of ordinary prudence would spend in preparation of this case. That's what this case is all about, and I don't ... there is nothing that's changed in the course of investigating this case, in preparing the petition for discipline or in any of the other matters. It comes down to that these hours were in excess of what was necessary a lawyer of ordinary prudence to spend in preparation of this type of case.... The number of hours that were spent was

---

[4] Fordham could, of course, have executed a fee agreement with Clark and would have avoided much of the contested testimony in this proceeding. The agreement could provide a premium (or discount) for exceptional (or unfavorable) results obtained. See DR2-106(B)(4). Mr. Fordham had no such agreement, leaving uncertainty as to the exact understanding on the discount and other issues. See Tr. II at 41.

> excessive and ultimately the fee ended up being excessive because if you multiply an excessive number of hours by a reasonable hourly fee, you end up with an excessive fee, and that's what this case is all about." Tr. I at 42-44.[5]

We do not believe that Fordham had a fair opportunity to prepare for and defend charges relating to the $2,000 premium or the retroactive inaccurate elimination of the 10% discount. See In Re Ruffalo, 390 US 544, 555 (1968). We do not, therefore, decide whether the $2,000 addition to a $48,000 fee would render the fee "substantially in excess" of a reasonable fee.

IV. CONCLUSION AND RECOMMENDATION.

In conclusion, we find that Fordham did not charge an excessive fee under DR 2-106 and, therefore, we do not recommend any discipline on this matter. Although Fordham's fee was significantly higher than would have been charged by

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[5] The uncontested testimony indicates that Fordham had specifically asked whether the premium was being pressed by Bar Counsel as the basis for the charge of an excessive fee. Fordham was told that the $2,000 was "not an issue". Ex. G p.8.

other attorneys who regularly defend driving under the influence cases, Clark understood the billing procedures utilized by Fordham and was able to monitor his expenses through regular monthly bills. Moreover, the Clarks pressed Fordham for a particular result and encouraged all lines of defense in the case. We do have serious question whether the addition of the premium and the inaccurate retroactive elimination of the discount rendered Fordham's fee "excessive" under DR 2-106 (A). Nevertheless, examining Fordham's representation of Timothy as a whole, in light of the theory on which Bar Counsel proceeded, we find that Fordham's fees were not substantially in excess of a reasonable fee.

JUNE 30, 1994

_____

Edward Notis-McConarty, Chair

_____

Leila Kern, Member

_____

Joseph Ayoub, Jr., Member

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the Hearing Committee report of the Board of Bar Overseers, in the matter of Bar Counsel, Petitioner vs. Laurence S. Fordham, Respondent, by Certified Mail, Return Receipt Requested and his counsel, Laurence M. Johnson, by first class mail and delivered in hand a copy to Bar Counsel, Arnold R. Rosenfeld.

Dated this 6th day of July 1994.

BOARD OF BAR OVERSEERS

By_____
Marie Jo Luc
Administrative Assistant

COMMONWEALTH OF MASSACHUSETTS
BOARD OF BAR OVERSEERS
OF THE SUPREME JUDICIAL COURT

BAR COUNSEL, Petitioner,	
vs.	BBO File No. C1-90-0557
LAURENCE S. FORDHAM, ESQ., Respondent.	

REPORT OF THE BOARD OF BAR OVERSEERS

Bar Counsel has appealed from the report of a hearing committee which recommended that we dismiss this petition for discipline.[1] We dismiss his appeal as well as the petition,

[1] The respondent has filed his own "appeal" from the decision in his favor. He takes issue with certain findings and

primarily for the reasons set forth in the hearing committee's report, which we adopt and incorporate by reference except to the limited extent indicated below.

The petition alleges that the respondent charged a clearly excessive fee in violation of Canon Two, Disciplinary Rule 2-106. In brief, the respondent represented a client against whom criminal charges had been brought for driving under the influence and related offenses. Under a fee agreement entered into with the client's father, the respondent was to be paid at his usual hourly rate ($200) for all time expended on the case. Although, as he disclosed to the father, the respondent lacked experience in criminal law, the respondent is a seasoned and well-respected civil lawyer.

The parties have stipulated that the respondent acted conscientiously, diligently, and in good faith in his representation of the client and his billing on the case. Because he had never tried an OUI case or appeared in the district court, the respondent spent over 200 hours preparing the case,[2] in part

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contentions of the hearing committee. Treating his filing as a motion to strike, we deny it.

[2] Some of the time was spent by other lawyers in the respondent's firm.

to educate himself in the relevant substantive law and court procedures. In all, the respondent billed the defendant's father more than $50,000 on the case, which involved his arguing four motions and trying the case for two days before a judge in the district court. The defendant was acquitted of all charges.

Although none of the experts who testified at the disciplinary hearing had ever heard of a fee in excess of $15,000 for a first-offense OUI case, the hearing committee found that the father had entered into the transaction with open eyes after interviewing other lawyers with more experience in such matters. He later acquiesced, despite mild expressions of concern, in the respondent's billing practices. Given the stipulation as to the respondent's bona fides, the explicit terms of the fee agreement, and the father's failure to object "in any real sense" to the charges, the hearing committee rejected Bar Counsel's allegation that the fee charged was "clearly excessive." Hearing Committee Report at 11. The committee reached its conclusion "with serious reservations," but found a "safe harbor"in the reasonableness of the hourly rate and the conscientious working of all the hours claimed. Id. at 12-13.

Accordingly, the committee recommended that the petition for discipline be dismissed.

We are in general agreement with the reasoning of the committee. It carefully weighed the relevant factors under the rule. The fee arrangement was fully disclosed to the father, who had interviewed and rejected other attorneys with more experience in OUI cases. It is implicit from the stipulation regarding bona fides that there was no intentional churning, and the father must bear some responsibility to raise objections to regular billings submitted fully in accordance with the agreement he had knowingly executed. The client refused suggestions that he plead and, as a result of the respondent's zealous defense, obtained the result he wanted despite evidence "heavily stacked against him." Hearing Committee Report at 12. Given the committee's careful application of all the factors listed in Disciplinary Rule 2-106(B), we agree, to use the language of the rule, that "a lawyer of ordinary prudence, experienced in the area of the law involved," would not be "left with a definite and firm conviction that the fee is substantially in excess of a reasonable fee." Disciplinary Rule 2-106(B).

In attacking this conclusion, Bar Counsel cites exclusively to civil cases dealing with the question of what

constitutes an unreasonable (that is, civilly unenforceable) fee. E.g., Society of Jesus of New England v. Boston Landmarks Comm'n, 411 Mass. 754 (1992); Grendel's Den, Inc. v. Larkin, 749 F.2d 945 (1st Cir. 1984). But attorney discipline is not automatically imposed just because a fee is not reasonable; a fee is clearly excessive only if it "is substantially in excess of a reasonable fee." Disciplinary Rule 2-106(B). Bar Counsel has not pointed us to a single disciplinary case, here or elsewhere, in which an attorney has been found to have violated the rule under circumstances such as obtain here. In fact, he has cited no case where an excessive fee has been found in the absence of deception, overreaching, or some other bad act. See, e.g., Matter of Kerlinsky, 406 Mass. 67, 6 Mass. Att'y Disc. R. 172 (1989) (violation of fee agreement); Matter of Palmer, 413 Mass. 33, 8 Mass. Att'y Disc. R. 185 (1992) (attorney not "entirely forthright" in collecting fee). A finding of any such perniciousness is forestalled here by the parties' stipulation that the respondent actually worked the hours billed and did so "conscientiously, diligently and in good faith."[3] (Tr. I:25-26).

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[3] It is regrettable that the respondent chose to bill his client for time spent drafting a note to secure payment of his bill. Although this certainly butts up against the outer

At the same time, however, we cannot accept the committee's suggestion that a lawyer may always find shelter from a finding of misconduct in the "safe harbor" of abiding by an agreement to bill a reasonable rate multiplied by the number of hours actually worked. Hearing Committee Report at 12-13. The application of the disciplinary rule requires the weighing of eight factors, not one, and we have concurred in the committee's general analysis precisely because it carefully weighed all the relevant factors. We reject the implication, no doubt unintended, that a lawyer may always escape discipline with billings based on accurate time charges for work honestly performed.

Bar Counsel raises two other objections that merit discussion. First, he asks that we make an additional finding that the respondent falsely represented that he would be assisted by an associate who "was knowledgeable in the field related to driving under the influence." We decline. The respondent testified, and the parties have stipulated, that he told the father the associate had authored a law review article on

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boundaries of "good faith," we pass it here in light of Bar Counsel's stipulation that all hours spent were billed in good faith.

social host liability. This truthful claim is far from the broader, false representation Bar Counsel would have us find. The only evidence that might be viewed as supporting Bar Counsel's position is the father's testimony that he had been told the associate had "some experience in this type of situation."[4] This vague claim will not bear the weight of an inference that the respondent made a knowing misrepresentation of fact.

Furthermore, even if the father's testimony did permit the inference, his testimony conflicts with the respondent's own testimony that he made no representation broader than that regarding the law review article. Given a conflict in testimony and the hearing committee's presumably intentional failure to make the finding Bar Counsel had requested on the issue, our drawing the inference would trench on the hearing committee's exclusive province as judge of the credibility of the witnesses. See S.J.C. Rule 4:01, § 8(3). This we may not do absent clear error. Matter of Carrigan, 414 Mass. 368, 9 Mass. Att'y Disc. R. 54 (1993); Matter of Provanzano, 5 Mass. Att'y Disc. R. 300, 304 (1987).

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[4] The son had no memory of the representation.

Second, Bar Counsel asks us to hold the fee clearly excessive because the hearing committee found that the respondent had charged a $2,000 "premium" over and above his time charges. This was an issue raised by the committee, not Bar Counsel. When first asked about it the respondent was unable to recall how the increment came to be a part of the bill, but he denied it was a premium. (Tr. II: 99-100). The next time the issue arose, the respondent, whose recollection was far from clear, suggested the charge was "combat pay" -- for weekend and evening work -- agreed to by the father. The hearing committee did not credit his explanation and inferred, apparently by a process of elimination, that the charge was a bonus for results obtained. The inference is a weak one, as it is based on no evidence other than the committee's refusal to credit the respondent's explanation and the relatively round amount in question ($2,007). See Hopping v. Whirlaway, Inc., 37 Mass. App. 121, 126 (1994).

Even if we were to agree that the charge amounted to a bonus, however, we must reject Bar Counsel's claim that we bottom on it a finding that the respondent charged an excessive fee. The $2,000 increment represented by the

"premium" is too slight to transform a fee not otherwise excessive into one that is "substantially in excess of a reasonable fee."[5] Disciplinary Rule 2-106; see Hearing Committee Report at 16.

More importantly, we agree with the committee that the respondent was not given adequate notice that the increment might form the basis for a finding of misconduct, particularly since Bar Counsel had expressly disavowed such a basis before trial. Hearing Committee Report at 13-14, citing In Re Ruffalo, 390 U.S. 544 (1968). Bar Counsel argues that this is not a case like Ruffalo, in which new charges were added to conform to testimony already taken on the original charges. Instead, he asks us only to apply a new theory for finding that the original charge was sustained. This he maintains is permissible under Zauderer v. Office of

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[5] It is not within our province to determine, and we express no opinion on the question, whether a bonus (if it was one) would be reasonable -- i.e., collectable -- here. See Beatty v. NP Corporation, 31 Mass. App. Ct. 606 (1992). We conclude only that under all the circumstances a 4% bonus, standing alone, is unlikely to render the total fee, whether reasonable or not, "substantially in excess of a reasonable fee."

Disciplinary Counsel, 471 U.S. 626, 654 (1984), and Matter of Saab, 406 Mass. 315, 323-24, 6 Mass. Att'y Disc. R. 278, 287 (1989).

In neither of those cases, however, would notice have assisted the attorney in disputing the new theory: the statement which formed the basis for a finding of deceptive advertising was plain on the face of Zauderer's ads, and notice that Bar Counsel intended to seek a harsher sanction based on the cumulative effect of Saab's skein of relatively "minor" offenses would have had no likely impact on the evidence produced at his hearing. Here, on the other hand, the very factual record on which the committee concluded the respondent had charged a bonus was generated without prior notice. This theory of misconduct is not alleged in the petition for discipline, Bar Counsel expressly advised the respondent by letter before the hearing that the question of a bonus "was not an issue" (Ex. G, at 8), and Bar Counsel told the committee the same thing at the hearing. (Tr. I:42-44). As a consequence, the respondent was caught flatfooted by questions about the "premium" -- questions, we note, raised by members of the hearing committee, not Bar Counsel. Under such circumstances, we can only speculate whether the respondent's stumbling and

contradictory attempts to explain the increment sprang from the indefensibility of an inappropriate charge or a lack of preparation understandable in the circumstances. Accordingly, we are not satisfied that lack of notice did not hamper his ability to respond. The hearing committee was right in declining to find misconduct on this basis.

In dismissing the petition for discipline, we would not be misunderstood as approving the respondent's billing conduct. We share the committee's evident dissatisfaction with a fee it justly describes as "truly enormous." Hearing Committee Report at 15. Nor would we encourage lawyers to emulate his apparent disdain for Ethical Consideration 6-3, which exhorts the practitioner not to charge clients for so much of the arc of his learning curve; only the father's clear agreement to pay the respondent to educate himself excuses it here.[6] We express no opinion on whether the fee as charged would be civilly enforceable. We conclude only that, under all

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[6] Ethical Consideration 6-3 admonishes a lawyer not to "accept employment in any area of the law in which he is not qualified unless he, in good faith, expects to become qualified through study and investigation, as long as such preparation would not result in unreasonable delay or expense to his client."

the circumstances of this case, the fee did not violate Disciplinary Rule 2-106.

Conclusion

For all of the foregoing reasons, we dismiss the petition for discipline. Five members dissent and would impose discipline for charging a clearly excessive fee. Mr. Bresnahan has requested that the public record reflect his dissent from the decision to dismiss the petition.

Respectfully submitted,

Ernest B. Murphy
Secretary

Approved: March 13, 1995

BOARD OF BAR OVERSEERS
of the Supreme Judicial Court
75 FEDERAL STREET
BOSTON, MASSACHUSETTS 02110
617/357-1860
Fax: 617/357-1872

BOARD OF BAR OVERSEERS
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GENERAL COUNSEL
Michael Fredrickson
ASSOCIATE GENERAL COUNSEL
Karen D. O'Toole
ADMINISTRATOR
Laurie G. Aaron

In accordance with the Rules of the Board of Bar Overseers, Section 3.53, at its meeting held March 13, 1995, the Board of Bar Overseers considered the record in re Lawrence S. Fordham (CI-90-0557).

After consideration and upon Motion duly made and seconded, it was unanimously

VOTED: to adopt the attached memorandum as the basis for the Board's vote, taken at its January 9, 1995 meeting, to dismiss the petition for discipline against Mr. Fordham.

(One member voted against the Motion.)

(Mr. Cohen recused himself from the discussion and vote.)

_____

Ernest B. Murphy
Secretary

Supreme Judicial Court for the Commonwealth of
Massachusetts
1412 Courthouse, Boston, Massachusetts 02108
(617) 557-1020

John D. Leubsdorf, Esquire
Cornell Law School
Myron Taylor Hall,
Ithaca, NY 14853

RE: No. SJC-06951

IN THE MATTER OF LAURENCE S. FORDHAM

NOTICE OF DENIAL OF PETITION FOR REHEARING

The Petition for Rehearing filed in the above captioned case has been considered by the court and is denied.

Very truly yours,

Jean M. Kennett, Clerk

Dated: September 11, 1996

To: Arnold R. Rosenfeld, Esquire
Laurence M. Johnson, Esquire
Supreme Judicial Court for Suffolk
Samuel Adams, Esquire
Harold Hestnes, Esquire

Rudolph F. Pierce, Esquire
Daniel Coquillette, Esquire
Edward J. Barshak, Esquire
Robert J. Muldoon, Jr., Esquire
John D. Leubsdorf, Esquire
Henry Monaghan
Richard Huber
Jerome Gotkin, Esquire
John Leubsdorf
Monroe H. Freedman

PETITION OF BOSTON BAR ASSOCIATION TO ADOPT THE CANONS AND THE DISCIPLINARY RULES IN THE CODE OF PROFESSIONAL RESPONSIBILITY ADOPTED BY THE AMERICAN BAR ASSOCIATION

REPORT OF SPECIAL MASTER

Pursuant to an order of the Supreme Judicial Court of November 17, 1971, the above-entitled matter was referred to me "as special master and commissioner (a) for study and consideration of the record and briefs, (b) to hear arguments...on the legal and policy questions raised by the briefs and otherwise, (c) to formulate any amendments or revisions of the proposed code which [I] may deem advisable and to receive and hear comments upon the same in [my] discretion, and (d) to prepare and submit [my] recommendations for action by this court."

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QUESTIONS PRESENTED

Turning now to the merits, the issues presented have been well framed by Boston in its brief (Boston brief, page 8). They are as follows:

1. Ought the Supreme Judicial Court, in the exercise of its supervisory power over attorneys practicing within this Commonwealth, adopt as Rule of court specific Canons of Ethics and Disciplinary Rules?
2. Should the Supreme Judicial Court adopt the Code of Professional Responsibility as amended and adopted by the House of Delegates of the ABA?
3. What, if any, modifications of the Code of Professional Responsibility as amended should be made by the Supreme Judicial Court?

1. Should the Court Adopt a Specific Code of Professional Responsibility?

Both of the Bar Associations before the court (Boston and Mass. Bar) are in favor of the adoption of a code. Indeed, with the possible exception of Brown, all of the parties before the Court would seem to favor the adoption of a code of some sort. Apart from Brown, such differences as exist among the parties have to do with specific disciplinary rules contained in the Code under consideration.[1] It is the opinion of the writer

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[1] While CLUM does not object to the idea of a code adopted by rule of court, it objects to its adoption in the manner sought by this petition. CLUM advocates that this court "refer this matter to the Massachusetts Judicial Conference,

that the time has come for this court to adopt a code of professional responsibility. There are now no readily ascertainable standards for members of our bar. The discipline of attorneys, to be sure, has never been regarded as a form of punishment; rather it is a method of protecting the public from incompetence, fraud and other wrongdoing. Still, the bringing of disciplinary proceedings against a lawyer is often attended with consequences no less serious than those arising from criminal prosecutions. Disciplinary proceedings often result in suspension or disbarment, which, in addition to depriving a lawyer of his means of livelihood, subject him to disgrace or ignominy. Disgrace or ignominy may even result from a censure. Of course, certain kinds of conduct, such as jury-fixing, stealing from a client, and forgery, all criminal offenses of the malum in se sort, present no problem. But there are many matters that do not fall within this class and yet should be the basis for disciplinary action. It has been argued

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appointing a committee to present a plan to this court for action by the conference on the Code with the work product of the conference to be presented to this court for approval." (CLUM brief, page 23) I do not understand Brown to oppose the idea of a Code, but he is opposed to the proposed code and to the manner of its proposed adoption. See Brown's counterproposal to the present petition (Brown brief, pages 28-31)

that because the conduct was not specifically proscribed, it cannot be the basis for disciplinary action. Such an argument was advanced recently in the county court in the matter of Bailey, Suffolk No. 69934 Law (Hereinafter cited as Matter of Bailey) There, Judge Kirk, rightly, I submit, rejected the contention that in the absence of a legislative enactment or a rule of court, disciplinary action against the defendant was precluded. In support of this conclusion, he quoted from the concurring opinion of Mr. Justice White In re Ruffalo, 390 U.S. 544, 555, where it was said that conduct which may be grounds for disbarment "includes conduct which all responsible attorneys would recognize as improper for a member of the profession." While the correctness of this statement or of its application in the Bailey case is not here questioned, it does leave something to be desired as furnishing a helpful guide in the regulation of the conduct of attorneys. As stated above, there is at the present time no enforceable code governing the conduct of attorneys. True, both Boston and Mass. Bar many years ago adopted the Canons of Ethics of ABA.[1] But they have never been adopted by this court. In

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[1] These Canons, which are to be distinguished from the Code of Professional Responsibility now under consideration, were adopted by ABA in 1908.

Matter of Cohen, 261 Mass. 484, 487, it was said by Rugg, C.J., "Codes of legal ethics adopted by bar associations of course have no statutory force. They are illuminating as showing views entertained by organizations of members of the bar concerning the tests of proper conduct for those charged with the important functions of attorneys to practice within the courts. They are commonly regarded by bench and bar alike as establishing wholesome standards of professional action." The adoption of a code by this court as a rule of court would put an end to the uncertainty that now exists as to what a lawyer may or may not do. No longer would a court, at least in most situations, be called upon to discipline a lawyer under the vague standard that condemns "conduct which all responsible attorneys would recognize as improper for a member of the profession." In Re Ruffalo, 390 U.S. 544, 555, Matter of Bailey, page 5. A Code if adopted as a rule of court would supply a pre-determined, mandatory, readily ascertainable standard of conduct to which attorneys could conform their actions. Under the above-quoted standard set forth in the Ruffalo case, a determination of improper conduct would invariably be made after the fact on the basis that the offender actually knew of the wrongful nature of his act. There should be a more definite standard than that. With

respect to laws defining criminal offenses it has been said that a "statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the essential of due process of law." Connally v. General Constr. Co., 269 U.S. 385, 391. Commonwealth v. Carpenter, 325 Mass. 519, 521. Alegata v. Commonwealth, 353 Mass. 287, 293. Likewise, because of the serious consequences attending disciplinary proceedings, a lawyer who is subjected to such proceedings ought not to be judged by standards that are so vague that "men of common intelligence must necessarily guess at [their] meaning or differ as to [their] application." Of course, there are bound to be situations that even a comprehensive and well drafted code will not cover. But a code will embrace most situations and is much to be preferred to the uncharted sea on which the profession now sails. At present, the courts of this Commonwealth often find themselves in the "awkward position of disciplining lawyers on what is essentially a standardless ad hoc basis." See Sutton, the American Bar Association Code of Professional Responsibility: An Introduction, 48 Tex. L. Rev., 255, 263.

RECOMMENDATION

For the reasons discussed above, I am firmly of opinion that a code of professional conduct should be adopted by a rule of court. I am convinced that the adoption of such a code by rule of court reflects the wishes of a majority of the profession in this Commonwealth.

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Disciplinary Rule 2-106(A)
Fees for Legal Services

(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee. (Code Pamphlet, 9)

The only opposition to this provision comes from Brown. He is of opinion that this provision when considered with minimum fee schedules of bar associations may violate the letter as well as the spirit of the federal anti-trust laws. But 2-106(A) must be read in conjunction with the variables stated in Rule 2-106(B)(1)-(8). When so considered, it is difficult to see wherein it constitutes illegal price fixing. As Boston argues, it seeks to ensure a fee tailored to the particular lawyer-client relationship rather than a maximum, across-the-board fee schedule. The purpose of the rule "is the simple, salutary one

of prohibiting egregious overreaching of a client by his attorney". (Boston brief, page 34) I agree.

RECOMMENDATION

I recommend the adoption of this rule.

QUESTION PRESENTED

Does the petition for writ of certiorari, which seeks review of a state court decision publicly censuring a lawyer for violating the state court's ethical code provisions prohibiting the charging of a clearly excessive fee, raise an issue of violation of due process rights requiring this Court's review?

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No. 96-946

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1996

LAURENCE S. FORDHAM,
Petitioner

V.

MASSACHUSETTS BAR COUNSEL,
Respondent.

On Petition for Writ of Certiorari to
the Massachusetts Supreme Judicial Court

RESPONDENT'S BRIEF IN OPPOSITION

Respondent requests that the Court deny the petition for writ of certiorari seeking review of an opinion of the Massachusetts Supreme Judicial Court. The decision below is IN THE MATTER OF LAURENCE S. FORDHAM, 423 Mass. 481 (1996). The copy of this decision is reproduced in this brief in opposition, Appendix A.

STATEMENT OF THE CASE

The petitioner's summary of the facts of the case does not correspond to the facts found by the Massachusetts Supreme Judicial Court, but is based instead on evidence in the record not adopted by the Board of Bar Overseers and the Supreme Judicial Court. The decision of the Massachusetts Supreme Judicial Court IN THE MATTER OF LAURENCE S. FORDHAM, 423 Mass. 481 (1996), appended to this brief in opposition, sets forth the facts found in this matter[1]. The facts found by the Board of Bar Overseers and the conclusions of the Supreme Judicial Court are the determining facts in a bar discipline matter. Massachusetts Supreme Judicial Court Rule 4:01 Sec. 8(3), 365 Mass. 696 (1974), as amended; *Matter of Anderson*, 416 Mass. 521, 525 (1993); *Matter of Orfanello*, 411 Mass. 551, 556 (1992).

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[1] The facts found by the Massachusetts Supreme Judicial Court are summarized by the Court in its opinion at 423 Mass. 481, 482-484 (1996).

The Facts:

Timothy Clark (Tim) was arrested for driving under the influence on March 4, 1989. He and his father, Laurence Clark (Clark), consulted with three lawyers who offered to represent Tim for between $3000 and $10,000.

Before Clark had hired anyone to represent Tim, he was servicing an alarm system at the petitioner's home. While there, Clark spoke with the petitioner's wife about the case and a meeting subsequently was held among Clark, Tim, and the petitioner, at which the petitioner learned the basic facts of Tim's arrest.

The petitioner informed Tim and Clark that he had never handled a driving under the influence case, a criminal case, or a case in the state district court system. He told them he was, however, an experienced litigator and he thought he could represent Tim competently. He also described himself as "efficient and economic in the use of his time". Further, he stated that if Clark decided to hire

him, he would charge an hourly fee for Tim's representation. Clark hired the petitioner.

The petitioner filed four pretrial motions on behalf of his client. The hearing committee characterized one of them as "creative". He tried the case before a district court judge and the defendant was found not guilty.

The petitioner sent Clark six bills during the representation. The bills totaled $50,022.25, reflecting 227 hours of billed time, including 153 hours of the petitioner's time. Clark did not pay the first two bills, which totaled over $13,000, and expressed concern about their amount. However, after the petitioner informed Clark most of the work was done other than taking the case to trial (the trial was scheduled for that week), Clark paid the petitioner $10,000. He made no other payments. It was stipulated that the work by the petitioner was actually done and that the petitioner acted conscientiously, diligently, and in good faith in representing Tim.

The Decision by the Massachusetts Supreme Judicial Court:

In reaching its decision, the Supreme Judicial Court held that the fee was clearly excessive because the number of hours spent by the petitioner on the case was unreasonable given the nature of the case and the skill requisite to perform the legal service properly. Pursuant to Massachusetts Supreme Judicial Court Rule 3:07, Canon 2, DR 2-106 (B)(1), these are factors to be considered in assessing the reasonableness of a fee. In addition, four experts, two called by the Bar Counsel and two called by the petitioner, testified that the number of hours devoted to the case was several times greater than they had spent on, or heard of, for a driving under the influence case.[2] The state court concluded that the number of hours devoted to the case was substantially in excess of the hours that a prudent experienced lawyer would have spent [DR 2-106 (B)] and was substantially in

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[2] 423 Mass. at 491.

excess of the amount customarily charged in the jurisdiction [DR 2-106 (B) (3)].[3]

The Court also found that Clark did not acquiesce in the fee, but that even if he had, there is nothing in the disciplinary rule or in the Massachusetts case law that makes acquiescence by a client a defense to charging a clearly excessive fee.[4] The Court held that since Disciplinary Rule 2-106 establishes an objective standard for judging whether a fee is clearly excessive, and on its face does not require dishonesty, bad faith, or overreaching, then the good faith, conscientiousness, and diligence of the attorney are not determinative.[5]

Finally, the Court rejected the petitioner's argument that the imposition of discipline offended his right to due process because he did not have fair notice that discipline could be imposed for billing excessive hours that were nonetheless spent diligently and in good

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[3] 423 Mass. at 490.
[4] 423 Mass. at 493.
[5] 423 Mass. at 493.

faith. There was abundant civil case law employing virtually the identical factors as contained within DR 2-106. Further, DR 2-106 defined "clearly excessive" fees and listed eight specific factors, to be evaluated by the standard of ordinary lawyer prudence, thereby providing fair warning to a lawyer.[6]

REASONS FOR DENYING THE WRIT

I.

THIS COURT HAS NO JURISDICTION TO CONSIDER MOST OF THE PETITIONER'S ARGUMENTS.

The petitioner makes several arguments in his attempt to claim that this Court has jurisdiction pursuant to 28 U.S.C. Sec. 1257. With the exception of his arguments that he did not have adequate notice that his actions would violate Supreme Judicial Court Rule 3:07, Canon 2, Disciplinary Rule 2-106, the petitioner did not raise these

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[6] 423 Mass. at 493-494.

issues before the Massachusetts Supreme Judicial Court. This Court does not review federal questions which have not been both raised and decided in the state court below. *Yee v. City of Escondido*, 503 U.S. 519, 523-33 (1992).

II.

THE STATE COURT DECISION DOES NOT VIOLATE THE PETITIONER'S RIGHT TO DUE PROCESS.

The petition for certiorari is based upon two dependent premises, neither of which is a valid basis for this Court to grant certiorari. First, the respondent wants this Court to make new findings of fact and conclusions of law for a state bar disciplinary proceeding. Second, based upon these substituted findings, the petitioner asks this Court to re-interpret the state disciplinary rule and hold that it did not provide adequate notice to him that his conduct would be in violation of that rule.

The finding of facts in a state bar disciplinary proceeding is the proper function of the state bar administrative board.[7] The petitioner has not provided any argument to support revising the facts as found by the state board and the state court.

It is the primary function of the state court issuing the rules governing the professional conduct of its attorneys to interpret their scope. It only is when the state court's interpretation of its own rules violates a federal constitutional right that this Court would have any interest in, or justification for, examining the state court findings and conclusions. *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991); (interpretation of state disciplinary rule governing pre-trial publicity violated First Amendment right to free speech).

The petitioner invokes the principle established in *In re Ruffalo*, 390 U.S. 544 (1968), that a lawyer has a right to notice of all

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[7] Massachusetts Supreme Judicial Court Rule 4:01 § . 8(3), as amended, 415 Mass. 1304 (1993).

charges pending against him, to contend that he, and the bar, had no notice, either in the rule or through prior court decisions interpreting the rule, that DR 2-106 would apply to a fee which was not the product of bad faith or lack of diligence in order to support his claim that he was denied due process by the state court decision.

The state court's interpretation of DR 2-106 and its application to the petitioner was not without proper notice[8] and did not otherwise violate the petitioner's due process rights. Contrary to the petitioner's assertion, DR 2-106 is not a general rule subject to broad interpretation. It is very specific in setting out eight factors[9] for

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[8] The petitioner cannot sensibly argue that he did not have notice of the charges against him. He was served properly with the petition for discipline which, along with the stipulations entered into by the parties, made clear that he was being charged with charging a clearly excessive fee because he spent an unreasonable number of hours on the case and charged well in excess of the fees generally charged for such a case.

[9] The factors are:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

judging whether a fee is clearly excessive. Included within these factors are the "time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly" and "the fee customarily charged in the locality for similar legal services." These factors are to be applied by an objective standard, by a lawyer of ordinary prudence, experienced in the area of law involved- according to the rule.[10] There is no language in the rule requiring an inquiry as to whether the fee charged was under fraudulent circumstances and, in its decision, the state court holds that it "shall not write such a meaning into the disciplinary rule." 423 Mass. at 493.

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(4) The amount involved and the results obtained.
(5) The time limitations imposed by the client or by the circumstances.
(6) The nature and length of the professional relationship with the client.
(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
(8) Whether the fee is fixed or contingent.

[10] Supreme Judicial Court Rule 3:07, Canon 2, DR 2-106 (B) states, in part, as follows:

"A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence, experienced in the area of the law involved, would be left with

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The same standards have been employed in numerous civil cases in Massachusetts.[11] In addition there are at least two bar disciplinary cases which imposed sanctions for excessive fees which did not involve bad faith or overreaching. Private Reprimand PR-87-14, 5 Mass. Atty. Disc. R. 501, 502 (1987); *Matter of Discipline of an Attorney*, 2 Mass. Att'y. Disc. R. 115, 117 (1980).

The petitioner attempts to escape the objective standard of the state court decision by arguing that lawyers of ordinary prudence disagree on whether his fee was clearly excessive and in support of that argument he offers the testimony of a group of lawyers who have joined him in this appeal.[12] They contend that the standard should be in accordance with their opinion, not the determination, based upon the evidence, of the highest court in Massachusetts. Their argument,

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a definite and firm conviction that the fee is substantially in excess of a reasonable fee.

[11] The cases cited by the state court are listed at 423 Mass. 494.

[12] See Amici Curiae Brief in Support of Petition for Writ of Certiorari, No. 96-946.

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however, would substitute a subjective standard of consensus among lawyers of large firms for an objective standard firmly rooted in the American Bar Association Code of Professional Responsibility and the American Bar Association Model Rules of Professional Conduct.[13] The state court's enforcement of its rule against excessive fees cannot be dependent on the opinions of a lawyer's colleagues and supporters.

The petitioner, an experienced lawyer,[14] could not have been truly surprised by the finding of the state court when the number of hours he spent and the size of the fee he charged was more than three times in excess of the time and fee typically charged for such services, especially where none of the experts testified that the facts were unusual for a driving under the influence case.[15] There must be some

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[13] Massachusetts Supreme Judicial Court Rule 3:07, Canon Two, DR 2-106, was adopted in 1972 and is taken primarily from the American Bar Association Code of Professional Responsibility. 359 Mass. 796 (1972). The American Bar Association Model Rules of Professional Conduct have a similar rule, MR 1.5

[14] See Petition for Writ of Certiorari, p. 4, where the petitioner's background is described.

[15] 423 Mass. at 488-489.

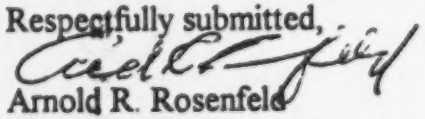
proportion between the claim defended and the fee charged. This is a matter of basic professional responsibility.

The petitioner's failure to comply with the disciplinary rules is not a result of lack of notice. His public censure by the state court does not offend due process as interpreted by this Court's decisions. The petition for certiorari should be denied.

CONCLUSION

For the above-stated reasons, the Court should deny the petition for certiorari.

Respectfully submitted,



Arnold R. Rosenfeld
Bar Counsel
OFFICE OF BAR COUNSEL
75 Federal Street
Boston, MA 02110
(617) 728-8750

January 24, 1997

IN THE MATTER OF LAURENCE S. FORDHAM.

Suffolk. April 2, 1996. - August 9, 1996.

Present: LIACOS, C.J., O'CONNOR, GREANEY, & FRIED, JJ.

Board of Bar Overseers. Supreme Judicial Court. Practice of law. *Attorney at Law.* Disciplinary proceeding. Compensation, Public censure, Canons of ethics.

Where the Supreme Judicial Court has responsibility to review attorney discipline matters, bar counsel necessarily has a right to appeal to the court from the Board of Bar Overseer's dismissal of a petition for discipline and the court has jurisdiction to decide the matter. [484-485]

The Board of Bar Overseers erred in dismissing bar counsel's petition for discipline against an attorney for charging a clearly excessive fee in violation of S.J.C. Rule 3:07, DR 2-106, where the evidence before the hearing committee demonstrated that the attorney and his associates devoted substantially more hours than a prudent experienced lawyer would have to the defense of a charge of operating a motor vehicle while under the influence of intoxicating liquor and related charges and that the fee charged, $50,000, was much higher than the fee customarily charged for such a bench trial. [487, 489-491]

The Board of Bar Overseers erred in concluding that an attorney's fee was not clearly excessive because the client entered into the fee agreement "with open eyes" where the hearing committee had found that the client did not appear to have understood the implications of entering the agreement; the board also erred in adopting the hearing committee's finding that the client acquiesced in the fee where the standard under S.J.C. Rule 3:07, DR 2-106 (A), is whether the fee "charged" is excessive. [491-493]

That the Supreme Judicial Court has not previously disciplined an attorney for charging a clearly excessive fee in violation of S.J.C. Rule 3:07, DR 2-106, did not warrant a conclusion that due process would be offended in the first instance of such discipline. [493-494]

The appropriate sanction for any attorney's charging a clearly excessive fee in violation of S.J.C. Rule 3:07, DR 2-106, is a public censure. [494-495]

INFORMATION filed in the Supreme Judicial Court for the county of Suffolk on April 7, 1995.

A motion to dismiss was heard by *Lynch*, J., and the case was reported by him.

Arnold R. Rosenfeld, Bar Counsel.

Laurence M. Johnson for the respondent.

O'CONNOR, J. This is an appeal from the Board of Bar Overseers' (board's) dismissal of a petition for discipline filed by bar counsel against attorney Laurence S. Fordham. On March 11, 1992, bar counsel served Fordham with a petition for discipline alleging that Fordham had charged a clearly excessive fee in violation of S.J.C. Rule 3:07, DR 2-106, as appearing in 382 Mass. 772 (1981), for defending Timothy Clark (Timothy) in the District Court against a charge that he operated a motor vehicle while under the influence of intoxicating liquor (OUI) and against other related charges. Fordham moved that the board dismiss the petition and the board chair recommended that that be done. Bar counsel appealed from the chair's decision to the full board, and the board referred the matter to a hearing committee.

After five days of hearings, and with "serious reservations," the hearing committee concluded that Fordham's fee was not substantially in excess of a reasonable fee and that, therefore, the committee recommended against bar discipline. Bar counsel appealed from that determination to the board. By a vote of six to five, with one abstention, the board accepted the recommendation of the hearing committee and dismissed the petition for discipline. Bar counsel then filed in the Supreme Judicial Court for Suffolk County (county court) a claim of appeal from the board's action.

Fordham moved in the county court for a dismissal of bar counsel's appeal. A single justice denied Fordham's motion and reported the case to the full court. We conclude that the single justice correctly denied Fordham's motion to dismiss bar counsel's appeal. We conclude, also, that the board erred in dismissing bar counsel's petition for discipline. We direct a judgment ordering public censure be entered in the county court.

We summarize the hearing committee's findings. On March 4, 1989, the Acton police department arrested Timothy, then twenty-one years old, and charged him with OUI, operating a motor vehicle after suspension, speeding, and operating an unregistered motor vehicle. At the time of the arrest, the police discovered a partially full quart of vodka in the vehicle. After failing a field sobriety test, Timothy was taken to the Acton police station where he submitted to two breathalyzer tests which registered .10 and .12 respectively.

Subsequent to Timothy's arraignment, he and his father, Laurence Clark (Clark) consulted with three lawyers, who offered to represent Timothy for fees between $3,000 and $10,000. Shortly after the arrest, Clark went to Fordham's home to service an alarm system which he had installed several years before. While there, Clark discussed Timothy's arrest with Fordham's wife who invited Clark to discuss the case with Fordham. Fordham then met with Clark and Timothy.

At this meeting, Timothy described the incidents leading to his arrest and the charges against him. Fordham, whom the hearing committee described as a "very experienced senior trial attorney with impressive credentials," told Clark and Timothy that he had never represented a client in a driving while under the influence case or in any criminal matter, and he had never tried a case in the District Court. The hearing committee found that "Fordham explained that although he lacked experience in this area, he was a knowledgeable and hard-working attorney and that he believed he could competently represent Timothy. Fordham described himself as 'efficient and economic in the use of [his] time.'. . .

"Towards the end of the meeting, Fordham told the Clarks that he worked on [a] time charge basis and that he billed monthly. . . . In other words, Fordham would calculate the amount of hours he and others in the firm worked on a matter each month and multiply it by the respective hourly rates. He also told the Clarks that he would engage others in his firm to prepare the case. Clark had indicated that he would pay Timothy's legal fees." After the meeting, Clark hired Fordham to represent Timothy.

According to the hearing committee's findings, Fordham filed four pretrial motions on Timothy's behalf, two of which were allowed. One motion, entitled "Motion in Limine to Suppress Results of Breathalyzer Tests," was based on the theory that, although two breathalyzer tests were exactly .02 apart, they were not "within" .02 of one another as the regulations require. See 501 Code Mass. Regs. § 2.56 (2) (1994). The hearing committee characterized the motion and its rationale as "a creative, if not novel, approach to suppression of breathalyzer results." Although the original trial date was June 20, 1989, the trial, which was before a judge without jury, was held on October 10 and October 19, 1989. The

judge found Timothy not guilty of driving while under the influence.

Fordham sent the following bills to Clark:

"1. April 19, 1989, $3,250 for services rendered in March, 1989.

"2. May 15, 1989, $9,850 for services rendered in April, 1989.

"3. June 19, 1989, $3,950 for services rendered in May, 1989.

"4. July 13, 1989, $13,300 for services rendered in June, 1989.

"5. October 13, 1989, $35,022.25 revised bill for services rendered from March 19 to June 30, 1989.

"6. November 7, 1989, $15,000 for services rendered from July 1, 1989 to October 19, 1989."

The bills totaled $50,022.25, reflecting 227 hours of billed time, 153 hours of which were expended by Fordham and seventy-four of which were his associates' time. Clark did not pay the first two bills when they became due and expressed to Fordham his concern about their amount. Clark paid Fordham $10,000 on June 20, 1989. At that time, Fordham assured Clark that most of the work had been completed "other than taking [the case] to trial." Clark did not make any subsequent payments. Fordham requested Clark to sign a promissory note evidencing his debt to Fordham and, on October 7, 1989, Clark did so. In the October 13, 1989, bill, Fordham added a charge of $5,000 as a "retroactive increase" in fees. On November 7, 1989, after the case was completed, Fordham sent Clark a bill for $15,000.

Bar counsel and Fordham have stipulated that all the work billed by Fordham was actually done and that Fordham and his associates spent the time they claim to have spent. They also have stipulated that Fordham acted conscientiously, diligently, and in good faith in representing Timothy and in his billing in this case.

We consider first Fordham's contentions that bar counsel has no right to appeal from the board's decision to dismiss a petition for bar discipline and that the court lacked jurisdiction to entertain the appeal. Supreme Judicial Court Rule

4:01, § 1 (1), as amended, 368 Mass. 900 (1976), provides: "Any attorney admitted to, or engaging in, the practice of law in this Commonwealth shall be subject to [the Supreme Judicial Court's] exclusive disciplinary jurisdiction and the provisions of these rules . . . ." This court's right of exclusive jurisdiction over attorney disciplinary matters necessarily includes jurisdiction to review decisions of the board not to recommend discipline. If, as in the present case, there is an assertion that the board, in deciding to dismiss a petition for discipline, has misinterpreted or misapplied the disciplinary rules, which were promulgated by the court, there can be no legitimate doubt that the court has jurisdiction to review the board's interpretation and application of those rules. Furthermore, nothing in our rules or in reason suggests that the exercise of our disciplinary powers may not be invoked by bar counsel by appealing from a decision of the board to dismiss a petition for discipline. Indeed, who, other than bar counsel, who is independent of the board and is a party to all disciplinary proceedings, S.J.C. Rule 4.01, § 7 (3), 365 Mass. 696 (1974) and § 8 (3), as amended, 415 Mass. 1304 (1993), would be entitled to challenge the board's dismissal of a petition for discipline? A complainant does not have standing to do so. *Callahan* v. *Board of Bar Overseers*, 417 Mass. 516, 518 (1994). We conclude that, because this court has responsibility to review matters involving attorney discipline, bar counsel necessarily has a right to appeal to the court from the board's dismissal of petitions therefor and the court has jurisdiction to decide the matter.

The board dismissed bar counsel's petition for discipline against Fordham because it determined, relying in large part on the findings and recommendations of the hearing committee, that Fordham's fee was not clearly excessive. Pursuant to S.J.C. Rule 3:07, DR 2-106 (B), "a fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence, experienced in the area of the law involved, would be left with a definite and firm conviction that the fee is substantially in excess of a reasonable fee." The rule proceeds to list eight factors to be considered in ascertaining the reasonableness of the fee:

> "(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

"(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

"(3) The fee customarily charged in the locality for similar legal services.

"(4) The amount involved and the results obtained.

"(5) The time limitations imposed by the client or by the circumstances.

"(6) The nature and length of the professional relationship with the client.

"(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

"(8) Whether the fee is fixed or contingent."

In concluding that Fordham did not charge a clearly excessive fee, the board adopted, with limited exception, the hearing committee's report. The board's and the hearing committee's reasons for dismissing the petition are as follows: Bar counsel and Fordham stipulated that Fordham acted conscientiously, diligently, and in good faith in his representation of the client and his billing on the case. Although Fordham lacked experience in criminal law, he is a "seasoned and well-respected civil lawyer." The more than 200 hours spent preparing the OUI case were necessary, "in part to educate [Fordham] in the relevant substantive law and court procedures," because he had never tried an OUI case or appeared in the District Court. The board noted that "[a]lthough none of the experts who testified at the disciplinary hearing had ever heard of a fee in excess of $15,000 for a first-offense OUI case, the hearing committee found that [Clark] had entered into the transaction with open eyes after interviewing other lawyers with more experience in such matters." The board also thought significant that Clark "later acquiesced, despite mild expressions of concern, in [Fordham's] billing practices." Moreover, the Clarks specifically instructed Fordham that they would not consider a guilty plea by Timothy. Rather they were interested only in

pursuing the case to trial. Finally, Timothy obtained the result he sought: an acquittal.

Bar counsel contends that the board's decision to dismiss the petition for discipline is erroneous on three grounds: First, "[t]he hearing committee and the Board committed error by analyzing only three of the factors set out in DR 2-106 (B) (1) - (8), and their findings with regard to these criteria do not support their conclusion that the fee in this case was not clearly excessive"; second, the board "misinterpreted [DR 2-106's] prohibition against charging a clearly excessive fee by reading into the rule a 'safe harbor' provision"; and third, "by allowing client acquiescence as a complete defense."

In reviewing the hearing committee's and the board's analysis of the various factors, as appearing in DR 2-106 (B), which are to be considered for a determination as to whether a fee is clearly excessive, we are mindful that, although not binding on this court, the findings and recommendations of the board are entitled to great weight. *Matter of Hiss*, 368 Mass. 447, 461 (1975). We are empowered, however, to review the board's findings and reach our own conclusion. *Matter of Anderson*, 416 Mass. 521, 525 (1993). In the instant case we are persuaded that the hearing committee's and the board's determinations that a clearly excessive fee was not charged are not warranted.

The first factor listed in DR 2-106 (B) requires examining "[t]he time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly." Although the hearing committee determined that Fordham "spent a large number of hours on [the] matter, in essence learning from scratch what others . . . already know," it "[did] not credit Bar Counsel's argument that Fordham violated DR 2-106 by spending too many hours." The hearing committee reasoned that even if the number of hours Fordham "spent [were] wholly out of proportion" to the number of hours that a lawyer with experience in the trying of OUI cases would require, the committee was not required to conclude that the fee based on time spent was "clearly excessive." It was enough, the hearing committee concluded, that Clark instructed Fordham to pursue the case to trial, Fordham did so zealously and, as stipulated, Fordham spent the hours he billed in good faith and diligence. We disagree.

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Four witnesses testified before the hearing committee as experts on OUI cases. One of the experts, testifying on behalf of bar counsel, opined that "the amount of time spent in this case is clearly excessive." He testified that there were no unusual circumstances in the OUI charge against Timothy and that it was a "standard operating under the influence case." The witness did agree that Fordham's argument for suppression of the breathalyzer test results, which was successful, was novel and would have justified additional time and labor. He also acknowledged that the acquittal was a good result; even with the suppression of the breathalyzer tests, he testified, the chances of an acquittal would have been "[n]ot likely at a bench trial." The witness estimated that it would have been necessary, for thorough preparation of the case including the novel breathalyzer suppression argument, to have billed twenty to thirty hours for preparation, not including trial time.

A second expert, testifying on behalf of bar counsel, expressed his belief that the issues presented in this case were not particularly difficult, nor novel, and that "[t]he degree of skill required to defend a case such as this . . . was not that high." He did recognize, however, that the theory that Fordham utilized to suppress the breathalyzer tests was impressive and one of which he had previously never heard. Nonetheless, the witness concluded that "clearly there is no way that [he] could justify these kind of hours to do this kind of work." He estimated that an OUI case involving these types of issues would require sixteen hours of trial preparation and approximately fifteen hours of trial time. He testified that he had once spent ninety hours in connection with an OUI charge against a client that had resulted in a plea. The witness explained, however, that that case had involved a second offense OUI and that it was a case of first impression, in 1987, concerning new breathalyzer equipment and comparative breathalyzer tests.

An expert called by Fordham testified that the facts of Timothy's case presented a challenge and that without the suppression of the breathalyzer test results it would have been "an almost impossible situation in terms of prevailing on the trier of fact." He further stated that, based on the particulars in Timothy's case, he believed that Fordham's hours were not excessive and, in fact, he, the witness, would have spent a

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comparable amount of time. The witness later admitted, however, that within the past five years, the OUI cases which he had brought to trial required no more than a total of forty billed hours, which encompassed all preparation and court appearances. He explained that, although he had not charged more than forty hours to prepare an OUI case, in comparison to Fordham's more than 200 expended hours, Fordham nonetheless had spent a reasonable number of hours on the case in light of the continuance and the subsequent need to reprepare, as well as the "very ingenious" breathalyzer suppression argument, and the Clarks' insistence on trial. In addition, the witness testified that, although the field sobriety test, breathalyzer tests, and the presence of a half-empty liquor bottle in the car placed Fordham at a serious disadvantage in being able to prevail on the OUI charge, those circumstances were not unusual and in fact agreed that they were "[n]ormal circumstances."

The fourth expert witness, called by Fordham, testified that she believed the case was "extremely tough" and that the breathalyzer suppression theory was novel. She testified that, although the time and labor consumed on the case was more than usual in defending an OUI charge, the hours were not excessive. They were not excessive, she explained, because the case was particularly difficult due to the "stakes [and] the evidence." She conceded, however, that legal issues in defending OUI charges are "pretty standard" and that the issues presented in this case were not unusual. Furthermore, the witness testified that challenging the breathalyzer test due to the .02 discrepancy was not unusual, but the theory on which Fordham proceeded was novel. Finally, she stated that she thought she may have known of one person who might have spent close to one hundred hours on a difficult OUI case; she was not sure; but she had never heard of a fee in excess of $10,000 for a bench trial.

In considering whether a fee is "clearly excessive" within the meaning of S.J.C. Rule 3:07, DR 2-106 (B), the first factor to be considered pursuant to that rule is "the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly." DR 2-106 (B) (1). That standard is similar to the familiar standard of reasonableness traditionally applied in civil fee disputes. See *Society of Jesus of New England* v. *Boston Landmarks Comm'n*, 411 Mass.

754, 759 n.10 (1992) (reasonable hours, when calculating fees pursuant to 42 U.S.C. § 1988 [1994], requires consideration as to "whether that time was reasonable in light of the difficulty of the case and the results achieved"). See also Restatement (Third) of the Law Governing Lawyers § 46 comment f (Proposed Final Draft 1996) ("The standards that apply when fees are challenged as unreasonable in fee disputes are also relevant in the discipline of lawyers for charging unreasonably high fees"). Based on the testimony of the four experts, the number of hours devoted to Timothy's OUI case by Fordham and his associates was substantially in excess of the hours that a prudent experienced lawyer would have spent. According to the evidence, the number of hours spent was several times the amount of time any of the witnesses had ever spent on a similar case. We are not unmindful of the novel and successful motion to suppress the breathalyzer test results, but that effort cannot justify a $50,000 fee in a type of case in which the usual fee is less than one-third of that amount.

The board determined that "[b]ecause [Fordham] had never tried an OUI case or appeared in the district court, [Fordham] spent over 200 hours preparing the case, in part to educate himself in the relevant substantive law and court procedures." Fordham's inexperience in criminal defense work and OUI cases in particular cannot justify the extraordinarily high fee. It cannot be that an inexperienced lawyer is entitled to charge three or four times as much as an experienced lawyer for the same service. A client "should not be expected to pay for the education of a lawyer when he spends excessive amounts of time on tasks which, with reasonable experience, become matters of routine." *Matter of the Estate of Larson*, 103 Wash. 2d 517, 531 (1985). "While the licensing of a lawyer is evidence that he has met the standards then prevailing for admission to the bar, a lawyer generally should not accept employment in any area of the law in which he is not qualified. However, he may accept such employment if in good faith he expects to become qualified through study and investigation, as long as such preparation would not result in unreasonable delay or expense to his client." Model Code of Professional Responsibility EC 6-3 (1982). Although the ethical considerations set forth in the ABA Code of Professional Responsibility and Canons of Judicial Ethics are not binding, they none-

theless serve as a guiding principle. See S.J.C. Rule 3:07, as appearing in 382 Mass. 768 (1981) (Ethical Considerations "are not adopted as a rule of this court, but those Ethical Considerations form a body of principles upon which the Canons of Ethics and Disciplinary Rules, as herein adopted, are to be interpreted").

DR 2-106 (B) provides that the third factor to be considered in ascertaining the reasonableness of a fee is its comparability to "[t]he fee customarily charged in the locality for similar legal services." The hearing committee made no finding as to the comparability of Fordham's fee with the fees customarily charged in the locality for similar services. However, one of bar counsel's expert witnesses testified that he had never heard of a fee in excess of $15,000 to defend a first OUI charge, and the customary flat fee in an OUI case, including trial, "runs from $1,000 to $7,500." Bar counsel's other expert testified that he had never heard of a fee in excess of $10,000 for a bench trial. In his view, the customary charge for a case similar to Timothy's would vary between $1,500 and $5,000. One of Fordham's experts testified that she considered a $40,000 or $50,000 fee for defending an OUI charge "unusual and certainly higher by far than any I've ever seen before." The witness had never charged a fee of more than $3,500 for representing a client at a bench trial to defend a first offense OUI charge. She further testified that she believed an "average OUI in the bench session is two thousand [dollars] and sometimes less." Finally, that witness testified that she had "heard a rumor" that one attorney charged $10,000 for a bench trial involving an OUI charge; this fee represented the highest fee of which she was aware. The other expert witness called by Fordham testified that he had heard of a $35,000 fee for defending OUI charges, but he had never charged more than $12,000 (less than twenty-five per cent of Fordham's fee).

Although finding that Fordham's fee was "much higher than the fee charged by many attorneys with more experience litigating driving under the influence cases," the hearing committee nevertheless determined that the fee charged by Fordham was not clearly excessive because Clark "went into the relationship with Fordham with open eyes," Fordham's fee fell within a "safe harbor," and Clark acquiesced in Fordham's fee by not strenuously objecting to his bills. The

board accepted the hearing committee's analysis apart from the committee's reliance on the "safe harbor" rule.

The finding that Clark had entered into the fee agreement "with open eyes" was based on the finding that Clark hired Fordham after being fully apprised that he lacked any type of experience in defending an OUI charge and after interviewing other lawyers who were experts in defending OUI charges. Furthermore, the hearing committee and the board relied on testimony which revealed that the fee arrangement had been fully disclosed to Clark including the fact that Fordham "would have to become familiar with the law in that area." It is also significant, however, that the hearing committee found that "[d]espite Fordham's disclaimers concerning his experience, Clark did not appear to have understood in any real sense the implications of choosing Fordham to represent Timothy. Fordham did not give Clark any estimate of the total expected fee or the number of $200 hours that would be required." The express finding of the hearing committee that Clark "did not appear to have understood in any real sense the implications of choosing Fordham to represent Timothy" directly militates against the finding that Clark entered into the agreement "with open eyes."

That brings us to the hearing committee's finding that Fordham's fee fell within a "safe harbor." The hearing committee reasoned that as long as an agreement existed between a client and an attorney to bill a reasonable rate multiplied by the number of hours actually worked, the attorney's fee was within a "safe harbor" and thus protected from a challenge that the fee was clearly excessive. The board, however, in reviewing the hearing committee's decision, correctly rejected the notion "that a lawyer may always escape discipline with billings based on accurate time charges for work honestly performed."

The "safe harbor" formula would not be an appropriate rationale in this case because the amount of time Fordham spent to educate himself and represent Timothy was clearly excessive despite his good faith and diligence. Disciplinary Rule 2-106 (B)'s mandate that "[a] fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence, experienced in the area of the law involved, would be left with a definite and firm conviction that the fee is substantially in excess of a reasonable fee," creates explicitly

an objective standard by which attorneys' fees are to be judged. We are not persuaded by Fordham's argument that "unless it can be shown that the 'excessive' work for which the attorney has charged goes beyond mere matters of professional judgment and can be proven, either directly or by reasonable inference, to have involved dishonesty, bad faith or overreaching of the client, no case for discipline has been established." Disciplinary Rule 2-106 plainly does not require an inquiry into whether the clearly excessive fee was charged to the client under fraudulent circumstances, and we shall not write such a meaning into the disciplinary rule. See *Private Reprimand PR-87-14*, 5 Mass. Att'y Discipline Rep. 501, 502 (1987) (violation of DR 2-106 [A] and [B], as appearing in 382 Mass. 772 [1981] found even where "no evidence of bad faith on the part of respondent"); *Matter of the Discipline of an Attorney*, 2 Mass. Att'y Discipline Rep. 115, 117 (1980) (violation of DR 2-106 [A] and [C], as appearing in 382 Mass. 772 [1981] even though no "overreaching or improper motivation").

Finally, bar counsel challenges the hearing committee's finding that "if Clark objected to the numbers of hours being spent by Fordham, he could have spoken up with some force when he began receiving bills." Bar counsel notes, and we agree, that "[t]he test as stated in the DR 2-106 (A) is whether the fee 'charged' is clearly excessive, not whether the fee is accepted as valid or acquiesced in by the client." Therefore, we conclude that the hearing committee and the board erred in not concluding that Fordham's fee was clearly excessive.

Fordham argues that our imposition of discipline would offend his right to due process. A disciplinary sanction constitutes "a punishment or penalty" levied against the respondent, and therefore the respondent is entitled to procedural due process. *In re Ruffalo*, 390 U.S. 544, 550 (1968). *Matter of Kenney*, 399 Mass. 431, 436 (1987) ("attorney has a substantial property right in his license to practice law"). Fordham contends that the bar and, therefore, he, have not been given fair notice through prior decisions of this court or the express language of DR 2-106 that discipline may be imposed for billing excessive hours that were nonetheless spent diligently and in good faith. *Commonwealth* v. *Sefranka*, 382 Mass. 108, 110 (1980), quoting *Connally* v. *General Constr. Co.*, 269 U.S. 385, 391 (1926) ("An essential principle of

due process is that a statute may not proscribe conduct 'in terms so vague that men of common intelligence must necessarily guess at its meaning'"). It is true, as Fordham asserts, that there is a dearth of case law in the Commonwealth meting out discipline for an attorney's billing of a clearly excessive fee. There is, however, as we have noted above, case law which specifically addresses what constitutes an unreasonable attorney's fee employing virtually the identical factors contained within DR 2-106. See *Mulhern* v. *Roach*, 398 Mass. 18, 25-30 (1986); *McLaughlin* v. *Old Colony Trust Co.*, 313 Mass. 329, 335 (1943); *Cummings* v. *National Shawmut Bank*, 284 Mass. 563, 569 (1933). See also *Beatty* v. *NP Corp.*, 31 Mass. App. Ct. 606, 611 (1991) ("factors . . . to be considered in determining whether a lawyer's fee is fair and reasonable have been amply discussed in the cases"). More importantly, the general prohibition in DR 2-106 (A) that "[a] lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee," is followed by eight specific, and clearly expressed, factors, to be evaluated by the standard of "a lawyer of ordinary prudence," in determining the propriety of the fee. Contrast *Gentile* v. *State Bar of Nev.*, 501 U.S. 1030, 1049 (1991), quoting *Grayned* v. *Rockford*, 408 U.S. 104, 112 (1972) (grammatical structure of attorney disciplinary rule and lack of clarifying interpretation by State court forced attorney to "guess at [the rule's] contours" thus failing to "provide 'fair notice to those to whom [it] is directed' "). In addition, nothing contained within the disciplinary rule nor within any pertinent case law indicates in any manner that a clearly excessive fee does not warrant discipline whenever the time spent during the representation was spent in good faith. The fact that this court has not previously had occasion to discipline an attorney in the circumstances of this case does not suggest that the imposition of discipline in this case offends due process. See *Commonwealth* v. *Twitchell*, 416 Mass. 114, 123, 125 n.13 (1993) (defendants not deprived of "fair warning" that particular conduct was proscribed by penal statute where criminal liability depended on "degree" of conduct); *Matter of Saab*, 406 Mass. 315, 324 n.13 (1989) (absence of codified standards to govern attorney discipline proceedings does not offend due process). We reject Fordham's due process argument.

In charging a clearly excessive fee, Fordham departed

substantially from the obligation of professional responsibility that he owed to his client. The ABA Model Standards for Imposing Lawyer Sanctions § 7.3 (1992) endorses a public reprimand as the appropriate sanction for charging a clearly excessive fee. We deem such a sanction appropriate in this case. Accordingly, a judgment is to be entered in the county court imposing a public censure. The record in this case is to be unimpounded.

So ordered.

Supreme Court, U.S.
FILED
JAN 9 1997
CLERK

No. 96-946

In The

Supreme Court of the United States

October Term, 1996

LAURENCE S. FORDHAM,

Petitioner,

vs.

MASSACHUSETTS BAR COUNSEL,

Respondent.

On Petition for Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts

AMICI CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JOHN J. CURTIN, JR.
Counsel of Record
BINGHAM, DANA & GOULD
Attorneys for Amici Curiae
150 Federal Street
20th Floor
Boston, Massachusetts 02110
(617) 951-8000

70121 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

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INTEREST OF AMICI

The amici respectfully urge the Court to grant the Petition because the Court's guidance is necessary on an issue of importance to the bar and to the administration of justice.

The amici primarily are active practicing trial lawyers threatened by the decision of the state court imposing discipline upon an experienced and respected trial lawyer "on what is essentially a standardless *ad hoc* basis." Sutton, *The American Bar Association Code of Professional Responsibility: An Introduction,* 48 Texas L. Rev. 225, 263. (The author was Reporter in the adoption of the Code of Professional Responsibility by the American Bar Association.) The remaining amici are professors who are authorities in professional responsibility.

CONSENT BY THE PARTIES

Written consent to file this amicus brief has been obtained from all parties to the action. The written consents are lodged herewith.

REASONS FOR GRANTING THE WRIT

The issue presented by this petition is this: Consistent with the due process clause, may discipline be imposed on an attorney based upon an *ad hoc,* after the fact, application of a vague disciplinary rule (DR 2-106), by ill-defined, unprecedented standard.

This is especially so when, the record shows that, there was a strong consensus among responsible members of the bar that the attorney's conduct was proper.

Discipline was imposed despite the heretofore well established disciplinary standard of unconscionability, described in Massachusetts in the adoption of the rule as "egregious overreaching. . . ." Petition of Boston Bar Association to adopt the Canons and Disciplinary Rules in the Code of Professional Responsibility adopted by the American Bar Association, Supreme Judicial Court for Suffolk County, No. 7631, Report of Special Master (retired Justice of the Supreme Judicial Court John K. Spaulding) dated April 13, 1972 pp. 25-26, reproduced in pertinent part in the petition at Pet. 87a (80a - 87a).[1] There was no forewarning by the state court that this standard would *not* be applied.

The state court's unprecedented application of the rule means "[t]he standard . . . is necessarily vague . . . and thus uncertain in its application." Wolfram, *Modern Legal Ethics*, § 9.3, p. 516 (1986).

The decision disregards a high body of heretofore consistent precedent establishing a much more stringent standard as a basis for discipline in case law and secondary authorities (Pet. 9). The disregarded standard is recognized in the Final Draft Restatement (Third) of the Law Governing Lawyers, Reporter's Note, section 46, Comment f, of "standards for lawyer discipline," and cases cited. The decision ignores the heretofore well-established standard. The decision explicitly rejects the established standard and declines to find even "overreaching" (Pet. 21a - 22a), much less "egregious overreaching" as required by the Report of Special Master in the judicial history of the adoption of the code in Massachusetts. Nor does the decision provide any elucidation for the guidance of lawyers in the future. Prior precedent is excised. Nothing is provided in its place.

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1. References to the Appendix to the Petition are to the pertinent pages without repeated reference to the Appendix. Other references are to the petition, by page number.

The underlying facts are few and uncontested. Laurence S. Fordham, a respected senior member of the Massachusetts bar, has been publicly censured by the state court for having charged a "clearly excessive" fee where, by agreement with the client, he charged at his usual hourly rates, there was no allegation that he "padded" his time, and Bar counsel has stipulated that he acted conscientiously, diligently and in good faith, in the time spent in representing his client and in billing. (Pet. 7a.)

This censure is unprecedented. The client chose Mr. Fordham, knowing the hourly basis of his fees and after interviewing three other lawyers who specialized in driving under the influence cases and who had quoted fixed fees. (Pet. 41a, 52a.) Mr. Fordham is an experienced trial lawyer who disclosed to the client that he had no experience in driving under the influence cases or other criminal matters. (Pet. 4a.)

The client was charged with two criminal offenses, driving under the influence and driving with a license under suspension for multiple speeding offenses, and two civil offenses, speeding and driving an unregistered motor vehicle. (Pet. 43a - 45a.) He was driving erratically at 55 m.p.h. in a 35 m.p.h. zone; had a more than half empty bottle of vodka in his car; had alcohol on his breath, slurred speech, and a flushed face; was unsteady on his feet when he got out of the car; failed field sobriety tests, including the alphabet test and the test of walking heel and toe; had breath test readings of .10 and .12, both above the presumptive level of intoxication; and later executed an affidavit making false assertions about warnings to which he declined to testify in court. (Pet. 40a; R. 74-77, Ex. 2; R. 87-88, 107-11; R. 1245.)

The results that petitioner obtained for his client were exceptional in view of very strong evidence against the defendant. The breath tests were suppressed by a "creative"

and "impressive" argument that the two tests were not "within .02" as required by law. (Pet. 5a, 13a.) After trial, there was a "not guilty" verdict for driving under the influence. (Pet. 5a.) Petitioner obtained by motion the dismissal of the criminal charge of driving with a suspended license for multiple prior speeding offenses. (Pet. 44a.) The client paid a $50 fine with no further suspension for speeding, and $50 costs for operating an unregistered motor vehicle. (R. 1293.)

I.

Professor John Leubsdorf captured the essence of the concern in a Memorandum in Support of Petition for Rehearing in the court below, stating as follows:

> A reasonable lawyer following Massachusetts caselaw on fees as between lawyer and client would have been amazed at the thought that the fee here could be held to be grounds for discipline. In the less demanding area of fee disputes, courts have upheld far more questionable arrangements than those here. *Cummings v. National Shawmut Bank,* 284 Mass. 563 (1933); *First National Bank v. Brink,* 372 Mass. 257 (1977); *Mulhern v. Roach,* 398 Mass. 18 (1986). In these cases, the client had never agreed to the fee basis, yet a very large fee was nevertheless upheld; in the second case, fiduciary relationships in addition to the lawyer-client relationship were also involved, yet still the fee was upheld. The courts have likewise declined to set aside large fees under fee contracts. *Rubin v. Taylor,* 1 Mass. App. 208 (1973); *Johnson v. Blacke,* 32 Mass. App.

> 399 (1992); see *Gagnon v. Shoblom*, 409 Mass. 63 (1991).
>
> This Court can reject the principles of these cases, but it has not heretofore done so. There was no fair notice here that the fee in question was unenforceable, much less that it was a disciplinary offense.

Id., pp. 3-4.

Professor Leubsdorf is the Associate Reporter of the Restatement (Third) of the Law Governing Lawyers, responsible for the portion relative to fees. He joined in this Memorandum in the state court in his individual capacity. He now is one of Petitioner's attorneys in filing the petition.

The cited decisions of the court below are affirmatively misleading in that they repeatedly allow civil recovery of charges substantially in excess of hourly charges for good results. In contrast, here the Court disallows hourly charges although the services were performed diligently, conscientiously and in good faith, and the results were exceptional. Such charges previously have been upheld civilly where the results were unfavorable to the client. (Pet. 16-17.)

Several decisions of this Court support granting the petition. *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991); *Goldfarb v. Virginia State Bar*, 423 U.S. 773 (1975). *See also In re Ruffalo*, 390 U.S. 544, 555, 556 (1968) (concurring opinion of Mr. Justice White) (discipline inappropriate on basis of after the fact determination where "responsible attorneys would differ in appraising the propriety of that conduct.") Justice White's concurring opinion in *In re Ruffalo* is renowned, and it has had extraordinary influence in setting the standard, here ignored,

for attorney discipline. *See* references in Report of Special Master (83a, 84a), and Kaufman, *Problems in Professional Responsibility* 668-69 (3d ed. 1989).

The state court decision also is a serious and substantial threat retrospectively and prospectively to the bar generally.

> Where does this leave the determined, no-stone-unturned criminal defenses celebrated by the profession? Apparently a lawyer may mount such a defense, but is forbidden to charge for it, under a fee contract, with the defendant's approval of the specific actions taken, at the lawyer's usual rates. That is wrong.

Id., p.2. The threat of discipline in such circumstances is particularly troubling given the state court's inherently vague standard of excessiveness that replaces the historic, well understood standard of unconscionability. The latter standard was described in the report underlying the adoption of the Code in Massachusetts as "egregious overreaching by the lawyer or the client." Report of Special Master, April 13, 1972, *supra*, p. 2. The Special Master (Retired Justice John K. Spaulding) specifically recognizes a due process violation where, as clearly is the case here, an attorney is "judged by standards that are so vague that men of common intelligence must necessarily guess at meaning or differ as to application." (Pet. 85a.)

Similarly, Justice White's concurring opinion in *In re Ruffalo*, 390 U.S. at 556, enunciated a principle, now well established, that discipline is inappropriate based upon a determination after the fact that conduct is improper where, as clearly is the case here, responsible members of the bar differ as to the propriety of the conduct. Conduct that is improper

and subject to discipline is conduct that "all responsible attorneys would recognize is improper for a member of the profession." *Id.* at 555.

Compelling evidence in support of the fees and the basis for fees in this case was given by many acknowledged leaders of the Bar, including the following: Ms. Carol Ball and Ms. Nancy Gertner, Messrs. Samuel Adams, Edward J. Barshak, Jerry Cohen, John J. Curtin, Jr., Harold Hestnes, Richard G.Huber, Robert W. Meserve, Robert J. Muldoon, Jr., Rudolph F. Pierce, and James D. St. Clair. They include two former presidents of the American Bar Association, former counsel to the President, former president of the Boston Bar Association, the Chairman and Secretary of the Massachusetts Board of Bar Examiners, a former Chairman of the National Conference of Bar Examiners, two former Justices of the Massachusetts Superior Court, a lawyer who has become a Justice of the Massachusetts Superior Court, a lawyer who has become a Judge of the United States District Court for the District of Massachusetts, a former dean of the Boston College Law School and distinguished scholar in the field of professional responsibility, and a subsequent member of the Board of Bar Overseers and respected author and scholar in the field of professional responsibility.

The testimony of Mr. Meserve is particularly significant and instructive. Mr. Meserve was a former president of the Boston and American Bar Associations, the American College of Trial Lawyers and the American Bar Foundation (R. 11: 1479). He was a member of the Clark Committee and chairman of the Kutak Committee, both of the American Bar Association. The former resulted in the formation of the Board of Bar Overseers and the latter in the ABA's promulgation of the Code of Professional Responsibility. He was appointed by the state court in 1984 as the first Chairman of the Board of Bar Overseers of the state. Mr. Meserve testified as follows:

> There is no question . . . but that setting a fee based upon the application of a lawyer's established and reasonable hourly rate to the time devoted to the matter is proper with respect to any matter, including, but not limited to, the defense of criminal charges and regardless of whether any such work is generally handled upon some other fee basis, such as a flat fee, contingency fee or transactional charge.
>
> That being the case, it is and always has been my understanding that where a lawyer is employed on a time-charge basis a fee which results from applying the lawyer's hourly rate to the actual time devoted to the matter in good faith cannot as a matter of law, be a "clearly excessive" fee. In such cases, the client has agreed to pay compensation in proportion to the time devoted to the matter and, so long as the time is devoted in good faith, the fee resulting therefrom cannot be deemed excessive at all, much less "clearly" so. I believe that my understanding in this regard is the general, if not universal, understanding of experienced and responsible lawyers, not merely civil litigators, but in every area of practice.

R. 11: 1483-84.

II.

As a result of the decision below, lawyers generally, and trial lawyers specifically, are made subject to discipline without warning by virtue of a newly fashioned standard that is so vague that even the most prudent lawyers will necessarily be uncertain as to its meaning and application. It is hard to conceive that anyone familiar with previous law in Massachusetts or with the law of professional responsibility generally could have foreseen this decision or the court's departure from the well established disciplinary standard of unconscionability.

Nor does the decision below provide any meaningful guidance for future conduct of lawyers. The decision that the fee here is clearly excessive is standardless, ad hoc in the eye of the beholder, and in disregard of contrary opinion by numerous respected, distinguished, members of the Bar and authorities in the law of professional responsibility.

The operative term "clearly excessive" means what the Court says it means, neither more nor less, and the decision is meaningless as guidance to any responsible member of the bar seeking safe billing practices consistent with responsibilities to the client under Canons 6 and 7.

Indeed, if petitioner is subject to discipline here on a standardless *ad hoc* basis, any lawyer, anytime, anywhere, is equally vulnerable. Petitioner not only is a knowledgeable, experienced, very respected member of the Bar who has distinguished himself by service to clients and to the profession, he is an authority on the law of professional responsibility, having taught it, edited a portion of Professor Kaufman's book, (*see* Preface, Kaufman, *supra*) and served on the members' Consultative Committee of the Restatement of the Law (Third) of the Law Governing Lawyers.

In the particular case, petitioner also had no choice but to provide the services for which he cannot be paid and is disciplined. Contrary to petitioner's advice, despite the strong evidence against him, the client declined to plead guilty and accept an alcohol education program. (Pet. 55a.) Petitioner "was encouraged to press all reasonable avenues of defense and to pursue the case to trial." (Pet. 56a.)

It was stipulated that all billed work was actually done and that Petitioner acted conscientiously, diligently and in good faith in his representation and billing. (Pet. 7a.) The client knew and approved of what Petitioner was doing, received monthly bills, and did not place Petitioner on notice that he objected in any real sense to Petitioner's fees or billing procedures. (Pet. 53a - 54a.)

Gentile v. State Bar of Nevada, supra, holds in part that the words "general" and "elaboration" are "classic terms of degree" with no "settled usage or tradition of interpretation in the law." 111 S. Ct. 2720, 2732 (1991). The same is true here. Wolfram, *Modern Legal Ethics,* § 9.3, p. 516 (1986) notes that "[t]he single standard of an excessive fee is necessarily vague because of the greatly varied settings in which fees are charged, and thus uncertain in its application." By contrast, the discipline standard of unconscionability and its equivalent, egregious overreaching, have a long and well-established history and meaning in case law and secondary authorities. The Final Draft Restatement (Third) of the Law Governing Lawyers recognizes " . . . the generally more stringent standard in discipline cases than in fee disputes." *Id.,* Reporter's note, Sec. 46, Comment f, of "Standards for lawyer discipline," and cases cited. *See also* Drinker, *Legal Ethics,* p. 174 (1953) ("flagrantly excessive"), American Bar Association Code of Professional Responsibility Annotated, p. 101 (O. Maru ed. 1979) (" 'unconscionable' . . ." so exorbitant and wholly disproportionate to the services

rendered as to shock the conscience.' "); *In re Ruffalo, supra* at 555, 556, ; Kaufman, *Problems in Professional Responsibility, Note: Disciplinary Rule—Problems of Generality,* pp. 667-669 (3rd ed. 1989).

Although the decision is a threat to all practicing lawyers, it is a particular threat to trial lawyers who charge at hourly rates for their services in accordance with well established practice in the profession. These lawyers in particular are confounded by a decision which disregards well established precedent in Massachusetts and elsewhere, and also disregards the language of the rules and authorities requiring consideration of all relevant factors of which those cited by the Court are non-exclusive. Although all are to be considered and none are dispositive pursuant to these precedents, the Court further confounds the Bar by making one — the charges of others — dispositive, mentioning one other, and ignoring all others, including such important factors as the importance of the case to the client, "the results obtained" and "the experience, reputation, and ability of the lawyer or lawyers performing the services." (Pet. 2 - 3.)

Petitioner's client, having interviewed three fixed fee driving-under-the-influence specialists, chose a lawyer of reputation, ability and experience as a general trial lawyer, rather than one who handled only driving-under-the-influence cases. By so choosing, the client obtained the benefit of general litigating skills, and a fresh perspective on driving-under-the-influence cases that redounded materially to the client's advantage. Of course, this also meant that Petitioner, like other trial lawyers, had to educate himself about that kind of case.

The client also chose a lawyer who charged by the hour, rather than demanding a flat fee paid in advance, as did other lawyers he consulted (Pet. 41a) and as do most criminal defense

lawyers. By so doing, the client avoided having to pay a full fee should the case terminate quickly, and avoided lawyers having a financial incentive to encourage a guilty plea. The client also placed on his lawyer the burdens of collecting the fee should the client fail to pay — as in fact the client did.

Nevertheless, the court without notice punished Petitioner for violating a wholly new standard based on the "customary flat fee" of specialists handling operating-under-influence cases. (Pet. 18a.) Far from intimating any such standard, previous Massachusetts civil authority had indicated that the fee of a lawyer charging by the hour by agreement with the client should not be adjusted on the basis of other factors. *Rubin v. Taylor,* 294 N.E. 2d 544 (Mass. App. 1973); *Beatty v. NP Corp.,* 581 N.E. 2d 1311 (Mass. App. 1991).

Nor had there been any previous hint that all trial lawyers were to base their fees on those charged by specialists, here lawyers limiting themselves to a driving-under-the-influence subspecialty. On the contrary, the Massachusetts rule lists as a relevant factor "[t]he experience, reputation, and ability of the lawyer or lawyers performing the services" — not those of other lawyers handling similar cases on a different basis. (Pet. p.3.) The court did not mention this factor. If apples are to be condemned for not meeting the standards applicable to oranges, due process requires prior notice.

CONCLUSION

The Petition should be granted to provide guidance as to the notice required as a predicate for discipline.

Respectfully submitted,

JOHN J. CURTIN, JR.
BINGHAM, DANA & GOULD
150 Federal Street - 20th Floor
Boston, MA 02110
(617) 951-8000

For:

SAMUEL ADAMS
WARNER & STACKPOLE
75 State Street
Boston, MA 02109
(617) 951-9000

EDWARD J. BARSHAK
SUGARMAN, ROGERS,
BARSHAK & COHEN, PC
101 Merrimac Street
Boston, MA 02114
(617) 227-3030

JEROME GOTKIN
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY AND POPEO, PC
One Financial Center
Boston, MA 02111
(617) 542-6000

JOHN M. HARRINGTON, JR.
ROPES & GRAY
One International Place
Boston, MA 02110
(617) 951-7612

HAROLD HESTNES
HALE & DORR
60 State Street
Boston, MA 02109
(617) 526-6616

ROBERT K. LAMERE
Central Artery Tunnel Project
Mail Stop 01-4C-07
One South Station
Boston, MA 02110
(617) 951-6184

WILLIAM F. LOONEY, JR.
LOONEY & GROSSMAN
101 Arch Street
Boston, MA 02110
(617) 951-2800

THOMAS F. MAFFEI
CHOATE, HALL & STEWART
53 State Street
Boston, MA 02109
(617) 248-5000

CORNELIUS J. MOYNIHAN, JR.
PEABODY & BROWN
101 Federal Street
Boston, MA 02110
(617) 345-1000

ROBERT J. MULDOON, JR.
SHERIN AND LODGEN LLP
100 Summer Street
Boston, MA 02110
(617) 426-5720

RUDOLPH F. PIERCE
GOULSTON & STORRS, PC
400 Atlantic Avenue
Boston, MA 02110
(617) 482-1776

R. ROBERT POPEO
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY AND POPEO, PC
One Financial Center
Boston, MA 02111
(617) 542-6000

GEORGE J. SKELLY
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM
One Beacon Street
Boston, MA 02108
(617) 573-4800

JOHN PAUL SULLIVAN
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY AND POPEO, PC
One Financial Center
Boston, MA 02111
(617) 542-6000

RICHARD G. HUBER[2]
New England School of Law
154-156 Stuart Street
Boston, MA 02116

MONROE H. FREEDMAN[2]
Hofstra University Law School
Hempstead, New York 11550

2. Not a member of the Massachusetts Bar.

(3)

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In The

Supreme Court of the United States

October Term, 1996

LAURENCE S. FORDHAM,

Petitioner,

vs.

MASSACHUSETTS BAR COUNSEL,

Respondent.

On Petition for Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts

REPLY BRIEF FOR PETITIONER

HENRY P. MONAGHAN
435 West 116 Street
New York, New York 10027
(212) 854-2644
Of Counsel

JOHN LEUBSDORF
15 Washington Street
Newark, New Jersey 07102
(201) 648-5273
Counsel of Record

DANIEL COQUILLETTE
885 Centre Street
Newton, Massachusetts 02159
(617) 552-8650
Of Counsel

LAURENCE M. JOHNSON
MAHONEY, HAWKES & GOLDINGS
75 Park Plaza
Boston, Massachusetts 02116
(617) 457-3100
Counsel for Petitioner

70121 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

MPP

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

1. Contrary to Respondent's assertion (Brief in Opposition, pp. 7-8), the Petitioner seeks review of one issue only: whether Petitioner was disciplined in violation of the Due Process clause because he had no notice when he acted that his conduct was unlawful. That issue was presented to the Supreme Judicial Court, which squarely rejected Petitioner's claim (Petition, pp. 22a-25a). Petitioner does not argue here, as the Respondent incorrectly asserts (Brief in Opposition, pp. 9-10), that he received no notice in the disciplinary proceedings of the charge against him.

2. The facts in the Petition are those found by the Hearing Committee (Petition, pp. 39a-62a) and the Supreme Judicial Court (Petition, pp. 1a-25a), which rejected none of the Hearing Committee's findings. The only exceptions are a few references--needed to set forth the procedural history of the

proceedings--to the conclusions of the Board of Bar Overseers (pp. 64a-75a) and its Chairman (pp. 27a-38a), and a few references to undisputed facts. Respondent fails to point to a single unfounded or inaccurate factual assertion in the Petition, and Respondent's assertion (Brief in Opposition, pp. 8-9) that Petitioner wishes this Court to make new factual findings is baseless.

3. Equally baseless is Respondent's assertion (Brief in Opposition, p. 8) that Petitioner asks this Court to re-interpret the Massachusetts disciplinary rule. On the contrary, Petitioner's claim is that the Massachusetts Court denied Petitioner Due Process by imposing retroactively on him its own drastic amendment of the law. Several arguments establish that claim:

(a) The Supreme Judicial Court explicitly rejected (Petition, p. 21a) the requirement, recognized by its own disciplinary decisions--which the Court did not discuss--and by authority throughout the nation, that dishonesty, bad faith or overreaching must be established before a lawyer is disciplined

for overcharging (Petition, pp. 11-14). In this case, of course, it was stipulated that Petitioner "acted conscientiously, diligently, and in good faith" in his representation and billing, and that all work billed was actually done (Petition, p. 7a).

(b) The disciplinary rule on which the Court relied allows discipline only when "a lawyer of ordinary prudence, experienced in the area of the law involved, would be left with a definite and firm conviction that the fee is substantially in excess of a reasonable fee." (Petition, p. 2). The rule itself--not Petitioner, as Respondent argues (Brief in Opposition, pp. 12-13)--made the appraisal of the prudent lawyer crucial, and past decisions confirmed that discipline should not be imposed when responsible attorneys disagreed (Petition, pp. 11-12, 14). In this case both bar officials and ten leading and prudent lawyers stated their astonishment that Petitioner could be subject to discipline (Petition, pp. 7-8, 13-14).

(c) The Massachusetts Court, in contradiction of established Massachusetts authority, held irrelevant the client's acquiescence (Petition, pp. 16-18, 22a). The client had chosen to

retain Petitioner on an hourly fee basis, rejecting flat fees proposed by other lawyers, and had urged Petitioner "to press all reasonable avenues of defense and to pursue the case to trial" (Petition, pp. 3a-5a, 21a). It never has been argued that Petitioner's hourly rate was excessive, and it is stipulated that Petitioner acted "conscientiously, diligently, and in good faith in representing Timothy" (Petition, p. 7a). The Court altered Massachusetts law without notice when it held that a lawyer who vigorously and successfully represented a criminal defendant in such circumstances can be disciplined if a court later decides that he put in too many hours.

(d) Likewise, it was the Court that reinterpreted--i.e., changed--Massachusetts law, which had authorized courts to award lawyers who succeeded several times their hourly charges even though their clients had never agreed to any such fee (Petition, pp. 14-16). In this case, Petitioner used a "creative" and "impressive" argument to suppress breathalyzer results, and then "obtained a not guilty verdict on a serious charge where the facts were heavily stacked against the defense" (Petition, pp. 5a,

13a, 55a). The Court's decision to punish Petitioner thus contradicted previous law governing fees as between lawyer and client. *A fortiori*, the Court's decision contradicted well established law requiring a far more stringent standard for discipline than for fee disputes (Petition, pp. 15-16).

4. This is very far from being, as Respondent argues, a case of a lawyer lacking in "basic professional responsibility" (Brief in Opposition, p. 14). Rather, this is the case of a respected and conscientious lawyer who labored "conscientiously, diligently, and in good faith" (Petition, p. 7a) to represent a criminal defendant who had agreed to pay his hourly time charges and who encouraged him "to press all reasonable avenues of defense and to pursue the case to trial" (Petition, p. 56a), only to find himself punished, after winning the case, because a court later switched retroactively the rules governing lawyers and decided that he had worked too hard.

If it is worthwhile to maintain the independence of the bar, and to protect lawyers who strive conscientiously to follow

the law and provide their clients effective assistance of counsel, this Court should hear this case.

Respectfully submitted,

LAURENCE S. FORDHAM

HENRY P. MONAGHAN
435 West 116 Street
New York, N.Y. 10027
(212) 854-2644
Of Counsel

By: JOHN LEUBSDORF
15 Washington Street
Newark, N.J. 07102
(201) 648-5273
Counsel of Record

DANIEL COQUILLETTE
885 Centre Street
Newton, Mass. 02159
(617) 552-8650
Of Counsel

LAURENCE M. JOHNSON
Mahoney, Hawkes & Goldings
75 Park Plaza
Boston, Mass. 02116
(617) 457-3100
Counsel for Petitioner